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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

JAMES B. STANLEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in reviving a Federal Tort Claims Act suit for injuries allegedly received by a serviceman during active duty participation in an official Army drug experimentation program, where the district court had entered an order under Fed. R. Civ. P. 54(b) dismissing the action pursuant to *Feres* v. *United States*, 340 U.S. 135 (1950), and no appeal was filed challenging that dismissal.

2. Whether a serviceman may pursue an action against his superior officers for alleged constitutional violations arising from his participation in an official Army drug experimentation program.

PARTIES TO THE PROCEEDING

In addition to the United States, the petitioners are Richard Helms, Joseph R. Bertino, M.D., Sidney Gottlieb, M.D., Bernard G. Elfert, Van Sim, M.D., H.D. Collier, and Albert Dreisbach. In addition, the state defendants in the proceedings below are the Board of Regents of the University of Maryland, Gerald Klee, M.D., and Walter Weintraub, M.D. The respondent is James B. Stanley.

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The Solicitor General, on behalf of the United States (Question 1), and on behalf of Richard Helms, Joseph R. Bertino, M.D., Sidney Gottlieb, M.D., Bernard G. Elfert, Van Sim, M.D., H.D. Collier, and Albert Dreisbach (Question 2), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 786 F.2d 1490. The district court's orders granting the motion to dismiss the United States and denying the motion to dismiss the individual federal defendants (App., *infra*, 54a-66a)

are reported at 549 F. Supp. 327 and 552 F. Supp. 619. The district court's orders reconsidering its denial of the motion to dismiss the individual federal defendants (App., *infra*, 21a-53a) are reported at 574 F. Supp. 474 and 587 F. Supp. 1071. The court of appeals' prior opinion vacating an earlier district court order of summary judgment in favor of the United States (App., *infra*, 67a-95a) is reported at 639 F.2d 1146.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1986. A petition for rehearing was denied on June 17, 1986 (App., *infra*, 96a-97a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671 *et seq.*], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

1. Stanley was an enlisted man who participated in secret chemical warfare tests conducted by the United States Army at the Army's Chemical Warfare

Laboratories on the Aberdeen Proving Grounds in Maryland in 1958. He volunteered to participate in the program while on active duty and was administered, without his knowledge, lysergic acid diethylamide (LSD) as part of that testing. In 1975, six years after his discharge, Stanley brought suit under the Federal Torts Claims Act (FTCA) alleging that the government had been negligent in administering the LSD and negligent in failing to monitor his condition after discharge.

These FTCA claims were dismissed by the district court, which held that the FTCA claims were barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950). The Fifth Circuit affirmed in 1981 (App., *infra*, 67a-95a). Finding that "the relationship between Stanley and the allegedly negligent individuals stemmed from their official military relationship," the court of appeals stated that "we are compelled to conclude that the trial court correctly applied *Feres* and held the United States immune to Stanley's suit under the Federal Tort Claims Act" (*id.* at 76a, 79a). The court of appeals, however, remanded the case to the district court for further proceedings, finding, without expressing any opinion on the merits, that plaintiff "has at least a colorable constitutional claim based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 * * * (1971)" (*id.* at 94a).[1]

2. On remand, plaintiff amended his complaint to allege new FTCA claims against the United States and to add *Bivens* claims against his superior officers

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[1] In so holding, the Fifth Circuit relied (App., *infra*, 94a) on an opinion which was subsequently overturned by the en banc Third Circuit in *Jaffee* v. *United States*, 663 F.2d 1226 (1981), cert. denied, 456 U.S. 972 (1982).

and the civilians who had participated in the program. In 1982, the district court dismissed the amended FTCA claims on the basis of the Fifth Circuit's opinion. However, relying on the Ninth Circuit's decision in *Wallace* v. *Chappell*, 661 F.2d 729 (1981) (App., *infra*, 62a), the court declined to dismiss the *Bivens* claims against the individual defendants. Shortly thereafter, on November 9, 1982, the district court entered, at the request of the United States, a partial final judgment dismissing all the FTCA claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (App., *infra*, 54a-55a).[2] In the same order, the district court ordered plaintiff to identify and serve at least one individual defendant, and plaintiff filed a second amended complaint naming the individual petitioners.[3] Plaintiff did not ap-

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[2] Rule 54(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

[3] In his amended complaint, plaintiff alleged that "[t]he wrongful act of the Defendants consists of an intentional act [while] Plaintiff was on active duty and subsequent negligent failure to protect Plaintiff, after becoming a civilian, from the dire consequences flowing from the original wrong" (Second Amended Complaint ¶ 11). Plaintiff further alleged that the defendants were "federal executive department officials and agents, who were acting under color of a covert federal Army problem" [*sic*] (*id.* at ¶ 14). The complaint asserted

peal from the entry of the final judgment dismissing the FTCA claims.

Subsequently, this Court reversed the Ninth Circuit's decision in *Chappell*, holding that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (*Chappell* v. *Wallace*, 462 U.S. 296, 305 (1983)).[4] The district court, acting sua sponte, reconsidered its prior refusal to dismiss plaintiff's *Bivens* claims in light of this Court's decision in *Chappell* (App., *infra*, 21a-53a). The district court concluded that *Chappell* was not controlling because "plaintiff in the instant case did not participate in the Army's testing program because a superior officer

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that the alleged conduct of the defendants violated his "constitutional right to privacy * * * implicit in the First, Third, Fourth and Ninth Amendments * * * [and] * * * implicit in the concept of liberty within the Fifth Amendment Due Process Clause, and generally within the 'penumbras' of the Bills [*sic*] of Rights" (*id.* ¶ 17). Plaintiff also named as defendants the Board of Regents of the University of Maryland and several physicians who were employees of the University of Maryland, alleging that these state defendants participated in the testing program pursuant to "an agreement or contract" (*id.* ¶ 20). Plaintiff asserted claims under 42 U.S.C. 1983 (Count II) and 42 U.S.C. 1985 (Count III) against these defendants. The lower courts have not addressed the counts relating to the state defendants (App., *infra*, 20a), which are not involved in this petition.

[4] The Court so held because of " 'special factors counselling hesitation' " to authorize a *Bivens* remedy (462 U.S. at 298, quoting *Bivens*, 403 U.S. at 396). The Court concluded that the "unique * * * structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers" (462 U.S. at 304).

ordered him to do so; instead * * * he volunteered" (*id.* at 33a-34a). The district court then certified this order for interlocutory appeal under 28 U.S.C. 1292(b) (App., *infra*, 6a).

3. The court of appeals affirmed the district court's refusal to dismiss the *Bivens* claims. The court held that a case-by-case analysis is required under *Chappell* to determine whether a particular *Bivens* suit would undermine military discipline. Noting that plaintiff had been a volunteer and had not been told that he was ingesting LSD, the court reasoned that he "could not possibly have challenged his 'orders' to drink the clear substance" (App., *infra*, 12a). Therefore, the court concluded, "'[t]he inescapable demands of military discipline and obedience to orders' are not implicated by the facts of this case" (*ibid.* (quoting *Chappell*, 462 U.S. at 300)).

The court of appeals also found absent the other special factor of "Congress's plenary authority over the military and its extensive activity in the field" (App., *infra*, 12a). That factor was absent, the court ruled, because the "intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* are clearly inadequate to compensate Stanley for the violations complained of here" because he did not have available to him "the remedies provided under article 138 of the Uniform Code of Military Justice" (*id.* at 12a-13a).

Having found that the "special factors" mentioned by this Court in *Chappel* were absent, the court also ruled that plaintiff's suit was not precluded by the remedial scheme afforded by the Veterans Benefits Act, 38 U.S.C. 301 *et seq.*, under the "adequate alternative remedy" analysis of *Carlson* v. *Green*, 446

U.S. 14, 18-19 (1980). Reasoning that the Act would not adequately compensate plaintiff, the court of appeals concluded that the Act was not the exclusive remedy for servicemen "injured while acting incident to military service" (App., *infra*, 15a). The court did not address petitioners' principal argument that the Veterans' Benefits Act was evidence of Congress's activity in the field and was thus relevant under *Chappell*.

The court of appeals went on to reverse the district court's 1982 Rule 54(b) final judgment dismissing plaintiff's FTCA claims against the United States. Ignoring the absence of any appeal from that final judgment, as well as the absence of the United States as a party on the appeal and the abence of briefing on the issue, the court reinstated plaintiff's FTCA claims against the United States. In thus overruling the Fifth Circuit's 1981 decision, the court acknowledged that that decision was the " 'law of the case,' " but reasoned that it need not be followed because "controlling authority has since made a contrary decision of the law applicable to the issue" (App., *infra*, 17a).

The court of appeals held that this "controlling authority" was provided by *Johnson* v. *United States*, 779 F.2d 1492 (11th Cir. 1986) (en banc), petition for cert. pending, No. 85-2039, and *Cole* v. *United States*, 755 F.2d 873 (11th Cir. 1985). Relying also on *United States* v. *Shearer*, No. 84-194 (June 27, 1985), the court held that "under *Johnson*, *Cole*, and *Shearer*, this case requires the case-by-case analysis to determine whether the purpose of the *Feres* doctrine would be served by precluding Stanley's FTCA claim against the government" (App., *infra*, 19a).

Concluding that no such purpose would be served, the court remanded the case with instructions to allow plaintiff to amend his complaint "to plead consistent with recent precedent" (*id.* at 20a).

REASONS FOR GRANTING THE WRIT

The court of appeals' decision in this case is rife with error with respect to the *Feres* doctrine, both as applied to the FTCA claims and as applied to the *Bivens* claims. Both of these issues are of great practical importance to the armed services, so review by this Court is warranted.

The court of appeals' assertion of jurisdiction for the purpose of resurrecting plaintiff's FTCA claims, despite the fact that their dismissal pursuant to Rule 54(b) was not appealed, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In addition, plaintiff's FTCA claims are clearly barred by the *Feres* doctrine, since his alleged injuries were incurred "incident to service" (340 U.S. at 146). The court of appeals' contrary holding conflicts with numerous decisions of other circuits, as we have explained more fully in our petition (at 6-7) in *United States* v. *Johnson*, No. 85-2039.

Issuance of a writ of certiorari is independently appropriate to review the court of appeals' decision that plaintiff may pursue his *Bivens* claims. This holding, if allowed to stand, will reopen an area previously thought to have been settled by this Court's ruling in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), and, contrary to this Court's decision in that case, will expose military personnel to personal liability for their actions. Furthermore, the court of appeals' de-

cision directly conflicts with decisions of three other circuits. *Mollnow* v. *Carlton*, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); *Gaspard* v. *United States*, 713 F.2d 1097 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); and *Jaffe* v. *United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982).

1. a. The court of appeals' sua sponte assertion of jurisdiction to reverse the final judgment dismissing the FTCA claims against the United States that plaintiff never appealed is clearly wrong. As this Court has noted, "[i]f no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is '"mandatory and jurisdictional."'" *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (quoting *Browder* v. *Director, Illinois Dep't of Corrections*, 434 U.S. 257, 264 (1978)).[6]

The rule that a court of appeals lacks jurisdiction in the absence of the filing of a timely notice of appeal is fully applicable to a failure to appeal from a Rule 54(b) final judgment. A central purpose of Rule 54(b) certification is to establish a definite starting point for appellate proceedings. See *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435-436 (1956); *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 8 (1980). The repose and definiteness afforded by this rule are defeated if the absence

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[6] The court of appeals' exercise of jurisdiction over the FTCA claims cannot be viewed as a mere oversight. In its recitation of the facts, the court acknowledged that final judgment had been entered on the FTCA claims in 1982 (App., *infra*, 5a). In addition, we pointed out that the court lacked jurisdiction over the FTCA claims in our petition for rehearing and suggestion of rehearing en banc, which was denied without opinion.

of an appeal from a Rule 54(b) judgment may be disregarded. See *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950) (holding, in a case arising before the effective date of Rule 54(b), that the failure to appeal from an interlocutory final decree forfeited any right to appellate review). The decisions of the lower courts uniformly hold that a judgment entered under Rule 54(b) must be appealed within the time permitted by Rule 4 of the Federal Rules of Appellate Procedure. *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1549 (11th Cir. 1986); *Smith* v. *Mine Safety Appliances Co.*, 691 F.2d 724, 725 (5th Cir. 1982); see generally, *Exchange National Bank* v. *Daniels*, 763 F.2d 286, 291-292 (7th Cir. 1985); 1B J. Moore, *Moore's Federal Practice* ¶ 0.404[1], at 118 n.4 (2d ed. 1984).

The facts of this case illustrate the mischief flowing from a refusal to respect the finality afforded by Rule 54(b). The court of appeals' jurisdiction in this case was predicated on Section 1292(b) to review the separate *Bivens* issue certified by the district court, and it was on that basis that the parties briefed and argued the case. The United States did not appear on appeal before the Eleventh Circuit because it had been dismissed as a party. Yet, without any warning, the court resurrected the FTCA claims against the United States, thus depriving the United States of its basic right to be heard.

b. Apart from the court of appeals' lack of jurisdiction, its decision that plaintiff's FTCA claims are not barred by the *Feres* doctrine is incorrect on the merits. As explained more fully in our petition in *Johnson*,[6] under the *Feres* doctrine a service member

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[6] A copy of our petition for a writ of certiorari in *Johnson* has been furnished to counsel for respondent.

"may not recover under the Federal Torts Claims Act for injuries which 'arise out of or are in the course of activity incident to service.'" *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 4-5 (quoting *Feres*, 340 U.S. at 146). In this case, there is no dispute that plaintiff's alleged injuries were incurred incident to military service.[7] Nevertheless, relying on its decision in *Johnson* v. *United States*, 749 F.2d 1530 (1985), reinstated, 779 F.2d 1492 (1986) (en banc), the Eleventh Circuit faulted the Fifth Circuit for failing in 1981 to "proceed to the next level of inquiry to determine whether the considerations underlying the *Feres* doctrine militated against permitting Stanley to bring the FTCA claim" (App., *infra*, 17a). According to the court of appeals, the law in the Eleventh Circuit is now that each case must be examined to determine whether the considerations underlying the *Feres* doctrine require preclusion of the particular suit at bar. As we have explained in our petition in *Johnson* (at 9-16), that conclusion, which conflicts with numerous decisions of other courts of appeals (*id.* at 6-7), is contrary to the rule that if an injury is incurred incident to military

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[7] The Fifth Circuit so held in 1981, ruling that "the relationship between [plaintiff] and the allegedly negligent individuals stemmed from their official military relationship" (App., *infra*, 76a). The conclusion that plaintiff was injured incident to service is plainly correct. This suit is by an enlisted man against his superior officers and others acting under the control of the Army for their alleged negligence in carrying out their duties pursuant to an official Army program, and plaintiff was on active duty at the Army's Chemical Warfare Laboratories on the Aberdeen Proving Grounds in Maryland when the alleged injuries took place.

service, then the injured service member cannot bring an FTCA suit, as the Court held in *Feres*.[8]

In *United States* v. *Shearer*, No. 84-194 (June 27, 1985), this Court recently reiterated the rule that service members may not recover for injuries which arise incident to service. The Court there rejected the plaintiff's argument that the Army had been negligent in failing to exercise better control over the activities of the service member who murdered the plaintiff's decedent, reasoning that such a suit "goes

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[8] Moreover, in this case the Eleventh Circuit far extended its decision in *Johnson*. In *Johnson*, the allegedly negligent government employees were civilian air traffic controllers employed by the Federal Aviation Administration and not in the military chain of command. On those facts the court held that a case-by-case inquiry was required in cases falling outside of "the typical *Feres* factual paradigm—an FTCA suit for injuries or death allegedly caused by the negligence of a serviceman or an employee of the armed services" (749 F.2d at 1537). Thus, even if the Court should decide that there is merit to the Eleventh Circuit's holding in *Johnson* that the *Feres* doctrine bars recovery by service members only when they are injured by others in the military chain of command, such a decision would not mean that plaintiff's FTCA claims, which clearly fall in the "*Feres* factual paradigm," are not barred.

If our petition in *Johnson* is granted and the Court rules in our favor in that case, then it will be clear that the court of appeals erred in its analysis of the FTCA claims in this case. Accordingly, the Court may want to hold Question 1 for disposition in light of *Johnson*. We do not think that it would be sensible to grant Question 1 here and hold our petition in *Johnson*, however, because the court of appeals here clearly erred in concluding that it had jurisdiction over plaintiff's FTCA claims, making it unlikely that the Court would reach the merits on the FTCA issue here. In addition, we think that plenary review of Question 2 is warranted, even if this Court grants our petition in *Johnson*, because *Johnson* does not involve *Bivens* actions (see note 10, *infra*).

directly to the 'management' of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman" (slip op. 6 (footnote omitted)). As the Court explained, such a suit would necessarily "mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions" (*ibid.*). Such decisions, the Court reasoned, are "decision[s] of command," and suits attacking such decisions are "the *type* of claims, that if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*id.* at 6-7 (emphasis in original)).

Here, as in *Shearer*, the plaintiff is challenging "decision[s] of command," *i.e.*, decisions concerning whether and how to use Army volunteers in conducting chemical warfare experiments in the late 1950s. The acts in issue unquestionably were committed pursuant to military orders in carrying out this official Army program. Plainly, plaintiff's suit will necessarily involve second-guessing of the military decisions concerning the manner and use of Army personnel. Plaintiff's status as a volunteer is therefore irrelevant, as the Fifth Circuit held in 1981 (App., *infra*, 73a-74a). Since the decisions plaintiff questions are no different in principle than the military personnel decisions at issue in *Shearer*, there can be no question that plaintiff's suit is precisely the "*type*" of suit (*Shearer*, slip op. 6) which, if allowed generally, would embroil civilian courts in managing military personnel decisions.[9]

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[9] Contrary to the court of appeals (App., *infra*, 19a), the Eleventh Circuit's *Feres* analysis finds no support in this Court's statement in *Shearer* that " '[t]he *Feres* doctrine can-

2. The Eleventh Circuit compounded its erroneous application of the *Feres* doctrine in holding that plaintiff may pursue his *Bivens* claims.[10] This ruling flies in the face of this Court's unequivocal holding in *Chappell:* "We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (462 U.S. at 305). This statement of the Court's holding makes plain that a case-by-case analysis as to whether military discipline would be undermined by a particular suit is not permitted. Rather, the holding in *Chappell* is based on the principle that any suit for damages by an enlisted man against his superior officers necessarily undermines military discipline.

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not be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases,'" (*Shearer,* slip op. 5). That remark was made in the context of rejecting the "bright-line" rule adopted by the Third Circuit that the *Feres* doctrine did not bar a FTCA suit where the plaintiff's decedent was off-duty and off-base when killed by a fellow service member.

[10] In our view, similar misunderstanding of the *Feres* doctrine led the court of appeals to err in its analysis of the *Bivens* claims here and to err in its analysis of the FTCA claims here and in *Johnson.* As this Court's decision in *Chappell* makes clear, the concerns underlying the *Feres* doctrine lead to the conclusion that service members injured incident to military service may pursue neither FTCA claims nor *Bivens* claims. Nevertheless, since FTCA actions and *Bivens* suits differ in some respects, and since there are factual differences between this case and *Johnson,* we think that plenary review of Question 2 is warranted, perhaps in tandem with *Johnson,* even if this Court grants our petition in *Johnson* and holds Question 1 for disposition in light of *Johnson* (see note 8, *supra*).

The Eleventh Circuit's reading of *Chappell* is in conflict with the specific holdings of three other circuits. *Gaspard* v. *United States*, 713 F.2d 1097 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); *Mollnow* v. *Carlton*, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); and *Jaffee* v. *United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982). In *Gaspard*, the Fifth Circuit reasoned that "[t]he need for plenary discretion in military affairs and the existence of an adequate, congressionally-imposed compensation scheme instruct us to avoid either imposing *or inquiring into* monetary damages when a service person is injured" (713 F.2d at 1103 (emphasis in original)). Similarly, in *Mollnow*, the Ninth Circuit ruled that "[b]y rejecting this court's consideration of such reviewability factors as the adequacy of the intraservice remedy, we believe the Court [in *Chappell*] necessarily imposed a *per se* prohibition on the filing of *Bivens*-type actions by servicemen against their superiors" (716 F.2d at 630).

Rather than relying on the Court's statement of its holding in *Chappell*, the court of appeals instead focused on the Court's observation that "[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service" (462 U.S. at 304). Viewing this statement as a rejection of a per se rule disallowing *Bivens* suits, the court of appeals reasoned that the decision in *Chappell* permits case-by-case determinations as to whether the " 'special factors' " that the Court in *Chappell* concluded militated against permitting service members to pursue *Bivens* suits against their superior officers were in fact present

(App., *infra*, 11a). In reaching this conclusion, the court below failed to note that no case involving money damages was cited in *Chappell* for the proposition that service members are not barred entirely from obtaining relief in civilian courts. In contrast, both the Fifth Circuit and the Ninth Circuit properly read this observation as applying to suits for a writ of habeas corpus or injunctive relief, and not to damage actions against superior officers. *Gaspard*, 713 F.2d at 1103 n.12; *Mollnow*, 716 F.2d at 629 n.4. Similarly, while decided before *Chappell*, the Third Circuit in *Jaffee* anticipated the reasoning of this Court in *Chappell*, holding that the principles underlying the *Feres* doctrine precluded *Bivens* actions by service members against their superior officers (663 F.2d at 1236-1237).[11]

Even if the permissibility of a *Bivens* action somehow turns on a case-by-case analysis of special factors, the analysis offered by the court below plainly gave inadequate consideration to the need for military command and discipline. The "unique structure" of the military is present in this case regardless of whether plaintiff volunteered to participate in the program pursuant to which he was administered LSD. The defendants, plaintiff's superior officers, were acting within the military command structure and were obeying their orders in carrying out the

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[11] With the exception of the decision in this case, the district courts have been unanimous in reading the Court's decision in *Chappell* as absolutely barring *Bivens* claims by enlisted personnel against their superior officers. *Alvarez* v. *Wilson*, 600 F. Supp. 706 (N.D. Ill. 1985); *Benvenuti* v. *Department of Defense*, 587 F. Supp. 343 (D.D.C. 1984); *Hampton* v. *United States*, 575 F. Supp. 1180 (W.D. Ark. 1983); *Bishop* v. *United States*, 574 F. Supp. 66 (D.D.C. 1983).

chemical warfare experiments attacked by plaintiff's suit. This suit therefore will necessarily require judicial second-guessing of those military orders. Whatever the wisdom of the decision to conduct such experiments in 1958, the *Feres* doctrine as applied by this Court in *Chappell* makes clear that it is not the task of the judiciary to second-guess that decision through damage suits by enlisted men against their superior officers.

In addition, the court of appeals misconstrued this Court's observation in *Chappell* that Congress had enacted the Code of Military Justice under which the claims of discrimination involved in that case could have been addressed. "Congress' activity in the field," this Court reasoned, constituted a second special factor precluding a *Bivens* remedy, even though the Code of Military Justice did not permit any recovery of damages (462 U.S. at 304). The court of appeals here concluded that "[t]hose intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* are clearly inadequate to compensate Stanley for the violations complained of here" because "Article 138 [of the Code of Military Justice] is not available to veterans" (App., *infra*, 12a-13a). This reasoning misses the point made in *Chappell* that "Congress' activity in the field"—not the adequacy of the remedy and certainly not whether the specific statute at issue there provided a remedy here—itself argues against a *Bivens* remedy. In this case, Congress's activity in the field is its enactment of the Veterans Benefits Act, and the independent significance of that activity was not

considered by the court of appeals.[12] Indeed, by holding that this special factor is absent because the Code of Military Justice is unavailable to veterans, the Eleventh Circuit has limited *Chappell* to cases involving only that statute. Such a holding is impossible to defend—the Veterans Benefits Act was the congressional activity in the field that the Court found precluded the FTCA claim in *Feres*. See *Gaspard*, 713 F.2d at 1103-1104.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1986

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[12] The court of appeals addressed the Veterans Benefits Act in the context of rejecting it as an alternative adequate remedy under the analysis of *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980) (App., *infra*, 13a-14a, & n.4). Contrary to the court of appeals' statement (*id.* at 13a), defendants had never argued that the Act was a fully adequate alternative remedy, but had argued instead that the Act constituted "Congress' activity in the field" under the analysis of *Chappell*. The court of appeals simply ignored this argument.

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 84-5273

JAMES B. STANLEY, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, and
JOSEPH R. BERTINO, ET AL., DEFENDANTS-APPELLANTS

Apr. 21, 1986

Appeal from the United States District Court
for the Southern District of Florida

Before HATCHETT, Circuit Judge, HENDERSON *, Senior Circuit Judge, and ALLGOOD **, Senior District Judge.

HATCHETT, Circuit Judge:

We are again faced with the task of defining the limits of the doctrine first annouced in *Feres v.*

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* See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), to determine whether a former serviceman may maintain this lawsuit against federal officials, both civilian and military, for injuries suffered before or after his discharge from military service. In affirming, we permit the lawsuit.

Appellants, several military personnel and civilians, appeal the district court's finding that the complaint in this case states a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) and that the action is not barred by *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983).[1]

FACTS

In February, 1958, appellee, James B. Stanley was a master sergeant in the United States Army. Stanley volunteered to participate in a program purportedly designed to develop and test military equipment and protective clothing for use during chemical warfare. On four occasions during the program, unknown to him, Army officials and others gave Stanley lysergic

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[1] The individual defendants are Joseph R. Bertino, M.D.; H.D. Collier; Albert Dreisbach; Bernard G. Elfert; Sidney Gottlieb, M.D.; and Van Sim, M.D., all of whom are or were federal employees or officers of the United States Army. Richard Helms, former director of the Central Intelligence Agency is also named as a defendant. The individual state defendants who were added are the Board of Regents of the University of Maryland; Gerald Klee, M.D.; and Walter Weintraub, M.D. Klee and Weintraub were physicians in the psychiatric residency program at the University of Maryland Hospital and participated in the 1958 experiments under a research contract between the United States Army and the University of Maryland.

acid diethylamide (LSD). After the 1958 LSD experiments, Stanley served in the Army for eleven years. The Army discharged him in 1969. The Army never informed Stanley that he had been administered LSD during the 1958 program. Stanley did not become aware of the LSD experiments until December, 1975, when the Department of the Army sent him a letter soliciting his participation in a follow-up study of persons who had been subjects of the 1958 experiments.

PROCEDURAL HISTORY

The original complaint in this case was filed on May 8, 1978, and consisted of claims against the United States under the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346(b), 2671-2680 (West 1984) (FTCA), for negligent administration of the LSD experiments.[2] The district court granted the government's motion for summary judgment relying on the doctrine enunciated in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). Under the *Feres* doctrine, "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity incident to service." *Feres*, 340 U.S. at 146, 71 S.Ct. at 159.

On appeal, the former Fifth Circuit held that the district court's application of the *Feres* doctrine was

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[2] Stanley's original complaint named the Central Intelligence Agency, the United States Department of Defense, and the United States Army as defendants. The complaint was amended to name the United States Government as the proper party defendant under the Federal Tort Claims Act. "Unknown individual federal agents and officers" were also named as defendants.

correct insofar as it precluded Stanley's claim for injuries sustained while he was in military service, but that the district court had improperly granted the government's motion for summary judgment. According to the former Fifth Circuit, the proper disposition of the case was dismissal of the complaint for lack of subject matter jurisdiction. *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. Unit B 1981) (*Stanley I*). The case was remanded to the district court for consideration of any amendment that Stanley might offer to cure the jurisdictional defect by alleging damages for injuries which occurred after his discharge from the Army.[3]

On July 21, 1981, Stanley amended his complaint to allege both a post-discharge claim for negligence under the FTCA and a constitutional tort claim under *Bivens*. On October 15, 1982, the district court dismissed Stanley's post-discharge FTCA and *Bivens* claims against the United States Government. The district court held, however, that Stanley had stated a *Bivens* action against the individual federal agents and officers who participated in the LSD experiments, for violation of his constitutional "rights of privacy and bodily integrity, and of the right of an individual to control his mind, his private thoughts and his in-

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[3] The former Fifth Circuit expressly rejected the government's argument that it would be futile to remand the action because any amendments which Stanley might make, including any constitutional claim, would be barred by *Feres*. The court declined to express any opinion on the merits of any new claims which Stanley might assert, but found that "Stanley has at least a colorable constitutional claim based on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 69 (1971)." *Stanley I*, 639 F.2d at 1159 (citations omitted).

tellectual process." *Stanley v. United States*, 549 F. Supp. 327, 331 (S.D.Fla.1982) (*Stanley II*).

Upon motion by the government, on November 9, 1982, the district court entered final judgment in favor of the government and vacated and withdrew that portion of its October, 1982, order which addressed Stanley's *Bivens* claim against the individual defendants. The district court held that if Stanley did not identify and serve at least one individual defendant within ninety days of its order, it would dismiss Stanley's *Bivens* claim against the "unknown" individual defendants.

On February 3, 1983, Stanley filed a second amended complaint naming the appellants as individual defendants. The district court apparently considered Stanley's second amended complaint sufficient to automatically reinstate that portion of its October, 1982, order which it had vacated.

In rejecting the argument that any *Bivens* claim which Stanley might have had against the individual defendants was precluded by *Feres*, the district court cited *Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981). The United States Supreme Court subsequently granted certiorari in *Chappell* and reversed the judgment of the court of appeals. *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). In light of the Supreme Court's opinion in *Chappell*, on October 28, 1983, the district court rendered an opinion clarifying its disposition of Stanley's *Bivens* claim against the appellants and explaining that *Chappell* did not affect that disposition. *Stanley v. United States*, 574 F.Supp. 474 (S.D.Fla. 1983), *modified*, 587 F.Supp. 1071 (S.D.Fla.1984).

The district court analyzed *Chappell* and concluded that *Chappell* did not establish a *per se* rule prohibit-

ing military personnel from maintaining suits against their superiors to recover damages for alleged constitutional violations. Since it found the facts of this case distinguishable from those in *Chappell*, the district court considered whether either of the two exceptions to a *Bivens* action would preclude this action. Finding that neither the "special factors" exception, nor the adequate alternative remedy exception were applicable in this case, the district court concluded that Stanley stated a cause of action against the individual agents and officers of the United States who participated in the LSD experiments.

Pursuant to 28 U.S.C.A. § 1292(b) (West Supp. 1985), on January 31, 1984, the district court certified its October 28, 1983, order for interlocutory appeal. By order dated April 13, 1984, we granted the appellants' motion for interlocutory appeal.

CONTENTIONS OF THE PARTIES

The appellants contend that the district court erred in holding that Stanley's *Bivens* action is not barred by *Chappell*. They argue that *Chappell* enunciated an absolute, *per se* rule that military servicemen may not bring *Bivens* actions against their superiors because such suits would necessitate inquiry into the internal structure of the military and thereby undermine discipline.

Stanley contends that *Chappell* does not state an absolute rule and that the "special factors" present in *Chappell* are not present in this case so as to negate his *Bivens* action.

The appellants also urge us to address Stanley's statutory civil rights claims on the merits, even though the district court failed to address those

claims. The appellants argue that the resolution of those issues now will promote both judicial economy and fairness because the same rationale which precludes Stanley's *Bivens* claim also precludes his statutory claims.

Stanley contends that we should not consider his statutory claims because those claims have yet to be addressed by the district court. Stanley also points out that the statutory claims are beyond the scope of this court's order allowing this interlocutory appeal.

ISSUES

We must decide whether Stanley's *Bivens* action is precluded by the Supreme Court's recent pronouncements in *Chappell* and whether to dispose of Stanley's statutory civil rights claims on the merits.

DISCUSSION

I. *Bivens Claim*

Appellants contend that Stanley's action is barred by the absolute rule enunciated in *Chappell* that military personnel cannot sue their superiors for constitutional torts.

A. *The Feres Doctrine*

The Supreme Court has articulated several different formulations of the considerations which it deems controlling in *Feres* doctrine analysis. In *Feres* itself the Supreme Court identified four factors from which it concluded that Congress had not intended to subject the government to liability for the serviceman's injuries: (1) the lack of parallel private liability; (2) the fact that because state law governs an action under the FTCA, the serviceman's right to recover

would depend upon the geographical location of the serviceman's duty station, a fortuitous circumstance over which the serviceman has no control; (3) the "distinctively federal character" of the relationship between the government and its military personnel; and (4) the absence of any provision under the FTCA for adjustment of a serviceman's recovery under the Act with any recovery which he might receive under military statutory compensation schemes. *Feres*, 340 U.S. at 141-46, 71 S.Ct. at 156-59.

Underlying these considerations was the belief that the relationship between a soldier and his superior officer is so unique and the intramilitary system of justice and administrative regulatory and remedial procedures so extensive that civilian courts should "hesitate long" before intervening to remedy any wrong allegedly done a serviceman. *Chappell*, 462 U.S. at 300, 103 S.Ct. at 2365, 76 L.Ed.2d at 591. As the Supreme Court explained in *United States v. Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 143, 99 L.Ed. 139 (1954):

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were alleged for negligent orders given or negligent acts committed in the course of military duty, led the Court [in *Feres*] to read the Act as excluding claims of that character. [Citation omitted.]

The Supreme Court has continued to recognize the distinctively federal character of the relationship between the government and members of its armed forces, and the existence of a statutory "no-fault"

compensation scheme as elements in the *Feres* analysis. *Chappell*, 462 U.S. at 299, 103 S.Ct. at 2364, 76 L.Ed.2d at 590; *Stencel Aero Engineering v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977). In *United States v. Muniz*, 374 U.S. 150, 162, 83 S.Ct. 1850, 1857, 10 L.Ed.2d 805 (1963), however, the Court acknowledged that "[i]n the last analysis, *Feres* seems best explained" by the *Brown* formulation of the doctrine. As demonstrated by the Court's emphasis in *Chappell*, the concern that civilian court inquiry might adversely affect the intramilitary disciplinary structure has emerged as the most compelling rationale for the *Feres* doctrine. *See Chappell*, 462 U.S. at 300, 304, 103 S.Ct. at 2365, 2367, 76 L.Ed.2d at 590-91, 593; *United States v. Johnson*, 749 F.2d 1530, 1535, 1538 (11th Cir.1985).

B. *The Chappell Extension of Feres*

The Supreme Court held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), that a federal official's violation of an individual's constitutional rights gives rise to a cause of action for damages, despite the absence of a federal statute specifically authorizing such constitutional tort actions. A *Bivens* cause of action may be defeated in a particular case, however, where the defendant demonstrates either that there are "special factors counselling hesitation in the absence of affirmative action by Congress," or that Congress has provided an "equally effective" alternative remedy which it explicitly declared to be a substitute for recovery directly under the constitution. *Bivens*, 403 U.S. at 396, 397, 91 S.Ct. at 2004, 2005.

In *Chappell*, the Supreme Court had occasion to consider the "special factors" that bear upon the

propriety of a *Bivens* action brought by military personnel against their superior officers. The Court concluded that those "special factors" also formed the basis of the Court's decision in *Feres*. *Chappell*, 462 U.S. at 298, 103 S.Ct. at 2364, 76 L.Ed.2d at 589-90.

The servicemen in *Chappell* were members of the United States Navy. Their duty station was a combat naval vessel. The servicemen alleged that because of their minority race, their superior officers failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed upon them penalties of unusual severity. *Chappell*, 462 U.S. at 297, 103 S.Ct. at 2364, 76 L.Ed.2d at 589. The Court concluded that the "special factors" of "the unique disciplinary structure of the military establishment and Congress's activity in the field" dictated against providing the servicemen a *Bivens* remedy against their superior officer. *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.Ed.2d at 593.

The military establishment is founded upon a unique "hierarchical structure of discipline and obedience to command." *Chappell*, 462 U.S. at 300, 103 S.Ct. at 2365, 76 L.Ed.2d at 591. The servicemen in *Chappell* were on active duty and subject to direct orders. The Supreme Court concluded that if those servicemen were permitted to expose their superior officers to personal liability, "[t]he special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined." *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.Ed. 2d at 593.

The Supreme Court's decision to bar the servicemen's claim was also influenced by the fact that the statutory scheme and the comprehensive internal jus-

tice system which Congress has devised to regulate military life, adequately provided for the review and remedy of the servicemen's racial discrimination complaints. *Chappell*, 462 U.S. at 302, 103 S.Ct. at 2366, 76 L.Ed.2d at 592.

The Court cautioned that it was not establishing a *per se* rule that military personnel could never seek redress in civilian courts for constitutional violations suffered in the courts of military service:

> This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.

Chappell, 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.Ed. 2d at 593 (citation omitted).

> Civilian courts must [merely] hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers [because] that relationship is at the heart of the necessarily unique structure of the military establishment.

Chappell, 462 U.S. at 300, 103 S.Ct. at 2365, 76 L.Ed. 2d at 591.

C. *Application of Chappell*

The first "special factor" considered by *Chappell* is the "unique disciplinary structure of the military establishment." *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.Ed.2d at 593. Unlike *Chappell*, this case does not present a situation where "[t]he special nature of military life, the need for unhesitating and

decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.Ed.2d at 593.

Stanley was a volunteer participant in the chemical warfare program. He had been released from his regular duties to participate in this program, administered by both military and civilian personnel. Stanley was not subject to direct military orders, but was free to leave the program at any time.

Most importantly, however, Stanley ingested the LSD when he was instructed to drink a clear substance which, unbeknownst to him, contained the hazardous drug. Because he was surreptitiously administered the drug, Stanley could not possibly have challenged his "orders" to drink the clear substance. "The inescapable demands of military discipline and obedience to orders" are not implicated by the facts of this case. *Chappell*, 462 U.S. at 300, 103 S.Ct. at 2365, 76 L.E.2d at 590. There is no concern here that the "peculiar and special relationship of the soldier to his superiors" might be disrupted. *United States v. Brown*, 348 U.S. at 112, 75 S.Ct. at 143.

The other "special factor" which the Court in *Chappell* considered compelling is Congress's plenary authority over the military and its extensive activity in the field. 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.Ed.2d at 593. We conclude that this factor also does not militate against permitting Stanley's *Bivens* claim. Those intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* are clearly inadequate to compensate Stanley for the

violations complained of here. *Chappell*, 462 U.S. at 303, 103 S.Ct. at 2367, 76 L.Ed.2d at 592-93. The Board for the Correction of Naval Records is not available to Stanley, nor can Stanley avail himself of the remedies provided under article 138 of the Uniform Code of Military Justice, 10 U.S.C.A. § 938 (West 1983). Article 138 is not available to veterans.

Neither of the "special factors" which the Supreme Court deemed dispositive in *Chappell* are present in this case. We hold, therefore, that Stanley's action is not precluded by *Chappell*. Our inquiry is not at an end, however. We must now consider whether Stanley's action is precluded under the adequate alternative remedy *Bivens* exception.[4]

Appellants argue that the Veterans Benefits Act, 38 U.S.C.A. §§ 301-362 (West 1979) (VBA), is a sufficiently adequate alternative remedy to a *Bivens* action to preclude Stanley's claim. *Bivens* requires that the appellants show that Congress explicitly declared the Veteran's Benefits Act to be a substitute for recovery directly under the Constitution and that Congress viewed the Act as equally effective as a *Bivens* action. *Bivens*, 403 U.S. at 397, 91 S.Ct. at 2005; *Carlson*, 446 U.S. at 16-19, 100 S.Ct. at 1470-1472. As the Supreme Court explained in *Carlson*,

> our inquiry at this step in the analysis is whether Congress has indicated that it intends a statu-

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[4] Because the Supreme Court in *Chappell* found that there were "special factors" which precluded the servicemen's action, it did not reach the question of whether the intramilitary remedies which it relied upon as "special factors" were sufficiently adequate alternative remedies to preclude the action under the second *Bivens* exception. A defendant in a *Bivens* action need merely establish one of the exceptions to defeat the action. *Carlson v. Green*, 446 U.S. 14, 18-19, 100 S.Ct. 1468, 1471-1472, 64 L.Ed.2d 15 (1980).

> tory remedy to replace, rather than to complement, the *Bivens* remedy. Where Congress decides to enact a statutory remedy which it views as fully adequate only in combination with the *Bivens* remedy, *e.g.*, 28 U.S.C. § 2680(h) [28 U.S.C.S. § 2680(h)], the congressional decision should be given effect by the courts.

Carlson, 446 U.S. at 19 n. 5, 100 S.Ct. at 1472 n. 5.

We do not find, nor has any other court which has addressed this issue found, any expression of congressionel intent that the VBA constitute a serviceman's exclusive remedy for injuries incurred incident to military service.

Appellants rely upon *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672-73, 97 S.Ct. 2054, 2058, 52 L.Ed.2d 665 (1977), to support their argument that the VBA is an adequate alternative remedy to a serviceman's *Bivens* action. The serviceman in *Stencel* sued the manufacturer of the egress life-support system in his fighter aircraft for the injuries he sustained when the system malfunctioned. The third-party claimant cross-claimed against the United States for indemnity. The Supreme Court considered the same factors which it considers under a claim brought directly by a serviceman to preclude the third-party claimant's indemnity claim. 431 U.S. at 670-74, 97 S. Ct. at 2057-59.

The serviceman in *Stencel* was receiving benefits under the VBA. In rejecting the third-party claimant's argument that the availability of the VBA to the serviceman barred its indemnity action for damages which it might be required to pay the serviceman, the Supreme Court concluded that the VBA serves a dual purpose. It provides a remedy for in-

jured servicemen and it clothes the government in the "protective mantle of the Act's limitation-of-liability provisions." *See Cooper Stevedoring Co. v. Kopke, Inc.*, 417 U.S. 106, 115, 94 S.Ct. 2174, 2179, 40 L.Ed. 2d 694 (1974). *Stencel* concluded, without further analysis, that "the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries. To permit [the third-party claimant's] claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans Benefits Act." *Stencel*, 431 U.S. at 673, 97 S.Ct. at 2059.

We conclude that *Stencel* is not binding precedent on the issue of whether the VBA is the exclusive remedy for servicemen injured while acting incident to military service. First, that issue was not expressly before the Court in *Stencel*. The third-party claimant in *Stencel* merely argued that "it *may* be fair to prohibit direct recovery by servicemen under the Act, since they are assured of compensation regardless of fault under the Veterans Benefits Act." *Stencel*, 431 U.S. at 672, 97 S.Ct. at 2508 (emphasis added). Moreover, as the dissent in *Stencel* noted, "the Veterans Benefits Act does not even contain an explicit declaration that it is the exclusive remedy against the Government for a serviceman's injury." *Stencel*, 431 U.S. at 675, 97 S.Ct. at 206. (Marshall, J., dissenting).

Most recently in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 202, 103 S.Ct. 1033, 1040, 74 L.Ed.2d 911 (1983), the Supreme Court acknowledged that "[w]e affirmed the dismissal of Stencel's cross-claim even though no limitation of liability statute applied to the case, because we found that the limitation of liability principle of *Feres v. United States*, 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct. 153 (1950),

precluded Stencel's indemnity claim." Thus, as *Lockheed* explains, the *Stencel* discussion of the VBA relates only to the VBA as a *Feres* factor or a "special factor" under the first *Bivens* exceptions. The *Stencel* discussion of the VBA is not relevant to an analysis of the VBA as a sufficiently adequate alternative remedy to preclude a *Bivens* claims under the second exception to *Bivens*. We relied upon *Lockheed* in concluding in *Cole v. United States*, 755 F.2d 873, 880 (11th Cir.1985), that "[t]he VBA . . . is best regarded as an additional reason for barring a claim [under the FTCA] based on an injury which is already determined to be 'incident to service,' rather than a dispositive factor [barring the FTCA claim]." Similarly, we hold that the VBA is not a sufficiently adequate alternative to a *Bivens* action to bar Stanley's claim.

II. *FTCA Claim*

In the previous appeal, the former Fifth Circuit held that Stanley's claim against the government under the FTCA was barred under the *Feres* doctrine because "Stanley was engaged in activities incident to his military service at the time his injuries arose." *Stanley I*, 639 F.2d at 1150. *Stanley I* established the "law of the case" on Stanley's pre-discharge claim against the government under the FTCA.

Under the "law of the case" doctrine, an appellate court's findings of fact and conclusions of law are *generally* binding in all subsequent proceedings in the same case. *Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678 (11th Cir.1984). In three instances federal courts have the power to reopen issues that have been previously decided on appeal: (1) when the evidence on a subsequent trial was substantially dif-

ferent, (2) when controlling authority has since made a contrary decision of the law applicable to the issue, or (3) when the previous decision was clearly erroneous and would work a manifest injustice. *Westbrook v. Zant*, 743 F.2d 764, 768-69 (11th Cir.1984) (citing *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967)).

The second exception to the "law of the case" doctrine is applicable in this case. The former Fifth Circuit's conclusion that Stanley's FTCA action against the government was barred under the *Feres* doctrine was premised *solely* upon its finding that Stanley was acting incident to military service at the time of the incident alleged. The former Fifth Circuit did not proceed to the next level of inquiry to determine whether the considerations underlying the *Feres* doctrine militated against permitting Stanley to bring the FTCA claim. The former Fifth Circuit did not, however, have the benefit of *Johnson v. United States*, 749 F.2d 1530 (11th Cir.1985), and *Cole v. United States*, 755 F.2d 873, *reh'g denied*, 765 F.2d 1123 (11th Cir.1985).

The plaintiff in *Johnson* was the personal representative of the estate of a serviceman who was killed when his helicopter crashed into the side of a mountain. The plaintiff's complaint alleged that the negligence of civilian Federal Aviation Administration air traffic controllers was the proximate cause of the serviceman's death.

Despite the fact that *Johnson* presented an atypical *Feres* situation in that the alleged tort-feasors were civilians, we proceeded to examine the policy which pervades each of the *Feres* considerations. Our examination was to determine whether the *Feres* doctrine should be extended to preclude an action where the alleged tort-feasor is *not* a member of the armed

forces or a civilian employee engaged in activities usually associated with the armed forces. *Johnson*, 749 F.2d at 1538-39 n. 6, 1540-42 (citing *Hunt v. United States*, 636 F.2d 580, 599 n. 51, 597 (D.C. Cir. 1980)).

In *Cole v. United States*, 755 F.2d at 877 n. 11, we interpreted *Johnson* as requiring the case-by-case analysis where the facts presented are "sufficiently different from the usual *Feres*-type case." *Cole* presented the novel issue of the government's liability for a serviceman's death where the incident which gave rise to the serviceman's death occurred while the serviceman was engaged in activity incident to his military service, but the government's alleged duty to warn arose *after* the serviceman's discharge. In *Cole* it was after the discharge that the government's knowledge concerning the hazards to which the serviceman had been exposed substantially increased. We concluded that the facts in *Cole* were so novel that it was both "*necessary* and instructive" to evaluate each of the considerations underlying the *Feres* doctrine in order to properly address the plaintiffs' claim. *Cole* at 877.

Subsequent to our decision in *Cole*, we granted the government's suggestion that *Johnson* be reviewed by the en banc court. *Johnson v. United States*, 760 F.2d 244 (11th Cir. 1985). Relying on *United States v. Shearer*, —— U.S. ——, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985), also decided after *Cole*, we upheld the panel's decision and reinstated its opinion. *Johnson v. United States*, 779 F.2d 1492, 1493 (11th Cir.1985) (en banc).

Shearer involved the kidnap and murder of one serviceman by another while both were off duty and away from their bases. The decedent's mother

brought an action under the FTCA alleging that the Army knew that the murderer was dangerous and negligently failed to control or warn others about him.

Although the Court held the claims barred because they "struck at the core" of the concerns underlying *Feres*, the Chief Justice stated that:

> [t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases.

Shearer, —— U.S. at ——, 105 S.Ct. at 3043, 87 L.Ed.2d at 44.

We hold that under *Johnson*, *Cole*, and *Shearer*, this case requires the case-by-case analysis to determine whether the purpose of the *Feres* doctrine would be served by precluding Stanley's FTCA claim against the government.

Since the former Fifth Circuit's ruling in *Stanley I*, controlling authority in the Eleventh Circuit has made a contrary decision of the law applicable to the Stanley facts. Today, in the Eleventh Circuit, controlling precedent does not automatically or mechanically preclude Stanley's lawsuit under the FTCA or *Bivens* upon a finding that he suffered the complained of injury while performing duties incident to military activities. The interpretation of the *Feres* doctrine in the Eleventh Circuit is far different from the interpretation of the *Feres* doctrine in the former Fifth Circuit. As the *Feres* doctrine is presently applied in the Eleventh Circuit, Stanley may have a cause of action for injuries inflicted before his discharge. Likewise, even as *Stanley I* held, recent precedent in this circuit, *Johnson* and *Cole*, provide Stanley with the possibility of a cause of action under both the FTCA

and *Bivens* for events occurring after his discharge. Consistent with the recent analysis of the *Feres* considerations in this circuit, we hold that neither Stanley's cause of action against the government under the FTCA nor his action against the federal officials and civilians under *Bivens* is necessarily barred by the *Feres* doctrine.

On remand, the district court should allow Stanley the opportunity to amend to plead consistent with recent precedent.

III. *Statutory Civil Rights Claims*

The appellants urge us to consider Stanley's statutory civil rights claims on the merits, even though those claims have not yet been addressed by the district court. We decline to do so. Not only have those claims not been addressed by the district court, but they are also beyond the scope of the issue for which we certified this interlocutory appeal.

CONCLUSION

We affirm the district court's judgment that Stanley's complaint states a cause of action against the appellants under *Bivens* and reverse the judgment that Stanley's FTCA action against the government is barred by *Feres*.

AFFIRMED in part, REVERSED in part.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. FLORIDA, N.D.

No. 78-8141-CIV-JAG

JAMES B. STANLEY, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Oct. 28, 1983

ORDER

GONZALEZ, District Judge.

I

THIS CAUSE has come before the court for review *sua sponte* upon the issuance of the Supreme Court's opinion in *Chappell v. Wallace*, —— U.S. ——, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), and upon counsel for the plaintiff's letter to the court and the plaintiff's response to the previously filed motions to dismiss. In light of all of the foregoing, the court finds it necessary to clarify its prior opinion denying in part the defendants' motion to dismiss, *Stanley v. United States, et al.* (*Stanley II*), 549 F.Supp. 327 (S.D.Fla.1982), and the application of the Supreme Court's opinion in *Chappell* to that decision.

This case involves the secret administration of LSD to the plaintiff, a member of the United States Army, as part of an Army experiment.

In 1958, the plaintiff James Stanley was a Master Sergeant in the United States Army stationed in Fort Knox, Kentucky. Stanley volunteered to participate in a program at the Chemical Warfare Laboratories at the Army Chemical Center, Aberdeen Proving Grounds, Edgewood Arsenal, Maryland. The purpose of the program allegedly was the development and testing of methods of defense against chemical warfare attack, including the testing of various gas masks and protective clothing.

During interviews with military and civilian personnel at Edgewood Arsenal, Stanley was asked to drink a clear liquid which, unknown to him, contained lysergic acid diethylamide (LSD).[1] Stanley alleges that he suffered severe reactions, including hallucinations, as a result of ingesting the LSD. When he returned to active duty at Fort Knox a month later, he maintains that he was in an altered behavioral and emotional state.[2]

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[1] Stanley's allegation that the military surreptitiously administered LSD to him, if true, clearly demonstrates "that his constitutional rights have been violated." *Garcia v. United States*, 666 F.2d 960, 962 (5th Cir. 1982) (affirming dismissal by this court of *Bivens* action brought by drug informer against United States and individual members of marshal's service). The source of the plaintiff's *Bivens* action in the instant case is the Fifth Amendment right to be free to decide for oneself whether to submit to drug therapy. *Stanley II*, 549 F.Supp. at 331 (relying on *Mills v. Rogers*, 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982)).

[2] Stanley alleges that following the completion of the Army's LSD testing, he periodically became incoherent and subjected his family to physical abuse, often not recalling these events

Stanley continued to serve his country in the Army for eleven years, all the while completely unaware of the wrong knowingly perpetrated against him. In 1969, the Army discharged Mr. Stanley without informing him that he had ingested LSD years earlier. In December 1975, Stanley received a letter from the Department of the Army, Walter Reed Army Medical Center, soliciting his participation in a followup study of the subjects of the 1958 LSD experiments. Only then did Mr. Stanley learn that the Army had secretly administered LSD to him in 1958.

The original complaint in this case consisted of claims brought against the United States under the Federal Tort Claims Act (FTCA or the "Act"), Pub. L. No. 601, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 (U.S.C.).[3] The question of this court's jurisdiction over those claims was first raised on the defendants' motion for summary judgment. This court granted the motion for summary judgment on the basis of the doctrine announced in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). The *Feres* doctrine provides that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the

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afterwards. He further maintains that the LSD impaired his performance of military duties, prompting a reduction in his service rank. Amended Complaint ¶ 5 (filed Apr. 29, 1981). Stanley also claims that the dissolution of his marriage in 1970 was primarily due to the psychological problems that have plagued him since his encounter with LSD. *Id.* ¶ 8.

[3] The Act waived the United States Government's sovereign immunity for the torts of its employees by granting the federal district courts jurisdiction over suits for damages "caused by the negligent or wrongful act or omission of any employee of the Government." 28 U.S.C. § 1346(b) (1976).

injuries arise out of or are in the course of activity incident to service." Id. at 146, 71 S.Ct. at 159.

Upon review of that ruling, the United States Court of Appeals for the Fifth Circuit concluded that this court's application of the *Feres* doctrine to preclude the claims brought in the original complaint was correct, but that this court improperly granted the motion for summary judgment. *Stanley v. CIA (Stanley I)*, 639 F.2d 1146 (1981). Rather, the Fifth Circuit held, the proper disposition of the case was dismissal of the complaint for lack of subject matter jurisdiction. The court of appeals then remanded the case for the trial court's consideration of any amendment that the plaintiff might offer to cure the jurisdictional defect.

The plaintiff then amended his complaint[4] and, in addition to the original allegations that the defendants gave him false information regarding the program in which he participated, he also alleged that the defendants were grossly negligent in failing to debrief and inform him of the 1958 episode upon his discharge, and in failing to continue to monitor his con-

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[4] Plaintiff's original complaint named as defendants the Central Intelligence Agency, the United States Department of Defense, and the United States Army. Plaintiff later amended his complaint to name as defendants the United States Government and unknown individual federal agents and officers. Amended Complaint (filed Apr. 29, 1981). A Second Amended Complaint, filed on February 3, 1983, named as defendants several individuals who allegedly violated the plaintiff's constitutional rights during and after his service in the Army. These individuals include Joseph R. Bertino, M.D., Board of Regents of the University of Maryland, H.D. Collier, Albert Dreisbach, Bernard G. Elfert, Sidney Gottlieb, M.D., Richard Helms, Gerald Klee, M.D., Van Sim, M.D., and Walter Weintraub.

dition subsequent to his discharge. The plaintiff seeks damages for this allegedly negligent conduct.

The defendant filed a motion to dismiss the Amended Complaint, arguing, *inter alia*, that the Fifth Circuit's opinion precluded the plaintiff from alleging any claim under the FTCA and that the plaintiff could not maintain any cause of action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), because any such claim would also be barred by the FTCA, did not rise to constitutional magnitude, or would be precluded by the applicable statute of limitations.

Heeding the opinion of the Fifth Circuit in *Stanley I*, this court decided that the plaintiff could not plead a statutory (i.e. FTCA) or *Bivens*-type claim against the Government itself. But this court did hold that Mr. Stanley had a viable *Bivens* action against individual agents and officers of the United States who participated in the LSD experiment. *Stanley II*, 549 F.Supp. at 329-32.[5] It is this last conclusion that the court finds necessary to reaffirm at this time.

In concluding that the plaintiff has a viable cause of action based on *Bivens* against the individual defendants, the court rejected the defendants' argument that any *Bivens* claim also was barred by the *Feres* doctrine. *Id.* at 330. The court cited the opinion of the United States Court of Appeals for the Ninth Circuit in *Wallace v. Chappell*, 661 F.2d 729 (9th Cir.1981), in support of its theory that although a claim against the government under the FTCA may

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[5] Although the Fifth Circuit did not express an opinion on the merits of the plaintiff's amended pleadings, it did find "that Stanley has at least a colorable constitutional claim based on *Bivens* . . . ." *Stanley I*, 639 F.2d at 1159.

be barred by the *Feres* doctrine, a *Bivens* cause of action arising from the same set of facts, against individuals, is not necessarily barred by *Feres*. The Supreme Court now having reversed the Ninth Circuit in *Chappell v. Wallace*, —— U.S. ——, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), it has been suggested that the plaintiff no longer has a viable cause of action based on *Bivens*. The task before this court is to decide if *Chappell* is controlling in the instant case, and whether the exceptions to a *Bivens* action preclude the plaintiff's claims against federal officers.

II

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), established that the victim of a constitutional violation by a federal officer has the right to recover damages against the official in federal court despite the absence of any statute conferring such a right; the doctrine of sovereign immunity bars a similar action against the United States itself. *Stanley II*, 549 F.Supp. at 330 (relying on *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979)).[6] The *Bivens* cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S.

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[6] *See, e.g., Lombard v. United States*, 690 F.2d 215, 227 (D.C.Cir.1982); *Laswell v. Brown*, 683 F.2d 261, 268-69 (8th Cir.1982); *Norton v. United States*, 581 F.2d 390, 393-94 (4th Cir.), *cert. denied*, 439 U.S. 1003, 99 S.Ct. 613, 58 L.Ed.2d 678 (1978); *Duarte v. United States*, 532 F.2d 850, 852 (2d Cir.1976).

at 396, 91 S.Ct. at 2004; *see Carlson v. Green*, 446 U.S. 14, 18, 100 S.Ct. 1468, 1471, 64 L.Ed.2d 15 (1980); *Garcia v. United States*, 666 F.2d 960, 965 (5th Cir.1982). The second is when defendants prove that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective. *Bivens*, 403 U.S. at 397, 91 S.Ct. at 2005; *see Carlson*, 446 U.S. at 18, 100 S.Ct. at 1471; *Garcia*, 666 F.2d at 965.

The *Bivens* action arose out of the need to deter federal officers from violating a citizen's constitutional rights. The Supreme Court recognized that absent a constitutional remedy, complainants would have no other form of judicial relief from federal abuses. Creation of the *Bivens* action was consistent with the traditional view that "damages . . . [be] recognized as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395, 91 S.Ct. at 2004.

In *Chappell v. Wallace*, the Supreme Court reviewed the propriety of a *Bivens* action arising out of an intramilitary dispute. The Court held that "the unique disciplinary structure of the military establishment and Congress' activity in the [military] field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." —— U.S. ——, 103 S.Ct. at 2367.

This court strongly believes that the *Chappell* decision has no effect whatsoever on the plaintiff's ability to maintain a cause of action arising from the facts of the instant case. Although the court relied on *Wallace v. Chappell*, 661 F.2d 729 (9th Cir.1981), to support the reasoning in its prior ruling that Mr.

Stanley has a valid *Bivens* claim, the plaintiff's cause of action is in no way dependent upon that opinion, nor is his claim precluded by the Supreme Court's reversal of that decision. The court finds that the facts of this case are distinguishable from *Chappell*, and although the Supreme Court has now substantially limited the availability of a *Bivens* action in cases to which the *Feres* doctrine may be applicable, the Court has not totally barred *Bivens* actions by servicemen for torts committed against them during their term of service.

III

In *Chappell v. Wallace*, —— U.S. ——, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), five enlisted men serving aboard a combat naval vessel brought a *Bivens* action against their commanding officer and various other superior officers. The complaint alleged that because of their minority race, the defendants failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity. For these transgressions, the plaintiffs sought damages, declaratory judgment, and injunctive relief.

The United States District Court for the Southern District of California dismissed plaintiff's complaint, holding that the actions complained of were nonreviewable military decisions, that the naval officers were entitled to immunity, and that the enlisted men had failed to exhaust their administrative remedies.

The United States Court of Appeals for the Ninth Circuit reversed, holding that the naval practices complained of were reviewable, and that the officers in question enjoyed only qualified immunity from suit. *Wallace v. Chappell*, 661 F.2d 729 (9th Cir.

1981). The court of appeals concluded that the *Feres* doctrine does not bar a *Bivens* action and, therefore, enlisted men could bring a constitutional claim against the naval officers involved. *Id.* at 735-36 & n. 9.

The Supreme Court of the United States sided with the district court and reversed the appellate court's decision. The Court found that the *Feres* doctrine's underlying policy of protecting military discipline constituted a "special factor" that precluded a *Bivens* action. —— U.S. at ——, 103 S.Ct. at 2367. In a sweeping concluding statement, the Court held that "enlisted military personnel may not maintain a suit to recover damages from a superior for alleged constitutional violations." *Id.* at —, 103 S.Ct. at 2368. Significantly, however, the Chief Justice limited the scope of the Court's decision, declaring that "[t]his Court has never held, *nor do we now hold*, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Id.* at —, 103 S.Ct. at 2367 (emphasis added).

The obvious import of the Court's qualified holding is to limit the *Chappell* decision to its facts. Because the Supreme Court explicitly refrained from precluding all civil actions by military personnel for constitutional wrongs committed during their service, and because the Court found it necessary to determine whether there were special factors present in the facts of *Chappell* which militated against finding a *Bivens* cause of action, this court concludes that the Supreme Court's blanket statement stripping military personnel of their right to maintain an action against superior officers bars only those actions in which the same "special factors" are present, i.e.,

a case in which a member of the military brings a suit against a superior officer for wrongs which involve direct orders in the performance of military duty and the discipline and order necessary thereto.

A

The first exception to a *Bivens* action is the existence of "special factors counselling hesitation." The *Chappell* Court considered the need for military discipline to be just such a "special factor." Traditionally, courts have not interfered with intramilitary disputes because they lack the requisite competency and because such intermeddling would threaten the legitimacy of military orders. —— U.S. at ——, 103 S.Ct. at 2365-67. The Supreme Court noted the "peculiar and special relationship" of the soldier to his superiors and observed that the rights of military personnel must give way to the overriding demands of discipline and duty. *Id.* at —, 103 S.Ct. at 2365. The Court explained that this is not only true in a combat situation, but also true in the training that precedes combat, so that immediate obedience to military procedures and orders can become so ingrained that it becomes reflexive. *Id.* Thus, it comes as no surprise that the *Chappell* Court refused to allow the enlisted men to recover damages from their superior officers for alleged constitutional violations, because the acts complained of occurred during the course and performance of the plaintiffs' duties as military personnel.

This court is well aware of the compelling need to protect military discipline in order to ensure the execution of military orders. However, the plaintiff's *Bivens* action in the instant case neither involves nor threatens to compromise military discipline. The case

does not involve a combat or combat-training situation; it does not involve any exigent circumstances; and it is not a case in which the plaintiff was either ordered or obligated to participate in a military exercise. Rather, this is a case in which the Army sought volunteers to test equipment, and the plaintiff volunteered his participation, in service to his country.[7] Had civilians been eligible to participate in the program, this case could easily have involved a person not a member of the military. In sum, applying the *Chappell* Court's own standard, this is not a case involving "[t]he special nature of military life, [or]

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[7] In a prior decision in the instant case, *Stanley I*, 639 F.2d 1146 (5th Cir. 1981), the Fifth Circuit attempted to minimize the significance of Mr. Stanley's volunteer status by citing fifteen cases in which courts dismissed a serviceman's action against the Government or individuals although he was volunteering for the activity which caused his injury. This court has reviewed each of the fifteen cases cited by the Fifth Circuit in support of this holding, *id.* at 1150, and finds that they are distinguishable from the case at bar. In almost every case, the plaintiff has sued the Government under the Federal Tort Claims Act, which this court finds distinguishable from a constitutional cause of action brought against individuals pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *See infra* notes 18-26 and accompanying text. In the few cases in which the plaintiff did bring an action against individuals for violation of his constitutional rights, the actions were either based on the FTCA, *Uptegrove v. United States*, 600 F.2d 1248 (9th Cir.1979), dismissed for lack of personal jurisdiction without further analysis, *id.*, concerned with military discipline in a different context, *Schmid v. Rumsfeld*, 481 F.Supp. 19, 21 (N.D. Cal. 1979) (relying on *Bailey v. Van Buskirk*, 345 F.2d 298 (9th Cir. 1965), *cert. denied*, 383 U.S. 948, 86 S.Ct. 1205, 16 L.Ed.2d 210 (1966), or failed to consider the *Bivens* decision, *Haas v. United States*, 518 F.2d 1138 (4th Cir.1975).

the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel . . . ." —— U.S. at ——, 103 S.Ct. at 2367.

The factual posture of the instant case clearly distinguishes it from several other appellate decisions which have reached a different result. The two most notable are *Gaspard v. United States*, 544 F.Supp. 55 (E.D.La.1982), *aff'd*, 713 F.2d 1097 (5th Cir. 1983), and *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981).[8]

Gaspard and *Jaffee* are basically identical in factual design and result. In both cases, former servicemen and their wives sued the United States and various named and unnamed federal officers for violating their constitutional rights. Specifically, the plaintiffs alleged that during the Army's atomic testing in the 1950's, their superior officers knowingly *ordered* them to purposely expose themselves to atomic fallout.[9] Years later, the plaintiffs suffered a host of

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[8] The *Gaspard* and *Jaffee* decisions, as products of the Fifth and Third Circuits, respectively, are neither binding nor controlling precedent on this court or the Eleventh Circuit. *See Hill v. Linahan*, 697 F.2d 1032, 1034 (11th Cir. 1984); *United States v. Butera*, 677 F.2d 1376, 1384 n. 6 (11th Cir.1982); Baker, *Primer on Precedent*, 34 Mercer L.Rev. 1175, 1185-89 (1983). As a case of first impression, *Stanley* offers the Eleventh Circuit an opportunity to define more clearly the interplay between the *Bivens* action and the *Feres* doctrine, and to demonstrate how underlying factual variations in the *Bivens* claim produce different results.

[9] *Gaspard*, 713 F.2d at 1099 ("The troops at Desert Rock [including Mr. Gaspard] typically were ordered into open trenches shortly before each atomic blast. After the initial shock waves passed, they were ordered to march within 1,000 yards of 'ground zero.'"); *Jaffee*, 663 F.2d at 1229 (The plaintiff and others "were ordered by their commanding

medical maladies, most of which they attributed to the in-service radiation exposures. The plaintiffs' *Bivens* claims soon followed.

Both the Fifth and Third Circuits dismissed the *Bivens* actions, holding that money damages may not be assessed against the military or its officers if the suit jeopardized military discipline and if there existed an exclusive statutory remedy. Essentially, the courts found that under the specific facts alleged, the rationale of the *Feres* doctrine barred the *Bivens* clams.[10]

The result in *Gaspard* and *Jaffee* is understandable because the soldiers there "were on active duty status at the time of [the atomic testing], in uniform, *and subject to military orders and discipline.*" *Gaspard*, 713 F.2d at 1099 (emphasis added).[11] Significantly, however, the plaintiff in the instant case did not participate in the Army's testing program because a superior officer ordered him to do so; instead—to reiter-

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officers to stand in a field without benefit of any protection against radiation while a nuclear device was exploded a short distance away.")

[10] After *Chappell v. Wallace*, —— U.S. ——, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), there can be little doubt that the impact of the *Feres* doctrine on a *Bivens* action is fact-specific. Indeed, the *Gaspard* court acknowledged that "[i]t is 'crystal clear' that *Bivens* claims are distinct from FTCA actions, and the *Feres* bar therefore does not automatically preclude the *Bivens* claim." 713 F.2d at 1102 (citations and footnote omitted); *see infra* notes 18-26 and accompanying text. Only because of the nature of the facts presented in *Gaspard* did the court of appeals decide that the *Feres* doctrine barred the plaintiffs *Bivens* claims. *Id.* at 1103.

[11] In one passage, the *Gaspard* court explained that the *Feres* doctrine would bar a *Bivens* claim if the action would "obstruct *necessary* military orders." 713 F.2d at 1103 n. 12 (emphasis added).

ate—he volunteered. Unlike the soldiers in *Gaspard* and *Jaffee*, who could have left the atomic testing site only upon penalty of insubordination, Mr. Stanley could have freely withdrawn from the Army's LSD experiments. In no way, then, does the instant case require the court to inquire into the propriety of military orders. Therefore, the single most compelling reason for extending the *Feres* doctrine to *Bivens* claims against military officers, and the basis for the *Chappell* decision, is not controlling in the case at bar.

Even if military discipline was somehow tangentially affected by this court's decision, there exists ample common-law and statutory authority to support judicial review of the plaintiff Stanley's constitutional claim. First, complaints by military personnel, which are encouraged by the Uniform Code of Military Justice, 10 U.S.C.A. § 938 (1975),[12] are judicially reviewable.[13] Second, military officials have tradition-

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[12] Article 138, 10 U.S.C.A. § 938, provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made.

[13] *Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973) (court stayed officer's discharge and granted mandamus relief to afford him review of his low efficiency report); *Smith v. Resor*, 406 F.2d 141, 145 (2d Cir.1969) ("Our reluctance . . . to review discretionary military orders does not imply that any action by the Army, even one violative of its own regulations, is beyond the reach of the courts."); *Cushing v. Tetter*, 478 F.Supp. 960 (D.R.I.1979) (naval enlistee properly failed to resort to remedies under Uniform Code of Military Justice before seeking federal judicial relief from order that he return to military unit); *Hickey v. Commandant of Fourth Naval Dist.*, 461 F.Supp. 1085 (E.D.Pa.1978) (naval reservist en-

ally been held accountable in courts of law,[14] and this practice continues today.[15] Third, military officers are

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titled to judicial review of Secretary's order calling reservist to active duty upon his disenrollment from Naval ROTC).

Judicial decisions over the last quarter century demonstrate that there is no broad barrier to judicial review of military matters. For example, the federal courts have greatly expanded their review of military court-martial proceedings. *See Schlesinger v. Councilman*, 420 U.S. 738, 745, 95 S.Ct. 1300, 1306, 43 L.Ed.2d 591 (1975); *Harmon v. Brucker*, 355 U.S. 579, 582, 78 S.Ct. 433, 435, 2 L.Ed.2d 503 (1958); *Scott v. Schlesinger*, 498 F.2d 1093 (5th Cir.1974); *Gibbs v. Blackwell*, 354 F.2d 469 (5th Cir.1965). The courts also have reviewed the military's decision to grant or deny inductees conscientious objector status. *See United States ex rel. Donham v. Resor*, 436 F.2d 751 (2d Cir.1971); *United States ex rel. Martinez v. Laird*, 327 F.Supp. 711 (N.D.Fla.1971). Most significantly, federal courts are not adverse to reviewing internal military affairs, *see Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958) (dicharge); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir.1971) (demotion), or examining the constitutionality of military decisions or regulations, *see Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (freedom of speech); *Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953) (due process); *Hatheway v. Secretary of Army*, 641 F.2d 1376 (10th Cir.), *cert. denied*, 454 U.S. 864, 102 S.Ct. 324, 70 L.Ed.2d 164 (1981) (due process and equal protection); *Priest v. Secretary of Navy*, 570 F.2d 1013 (D.C. Cir.1977) (freedom of speech); *Betonie v. Sizemore*, 496 F.2d 1001 (5th Cir.1974) (right to counsel); *United States v. Flower*, 452 F.2d 80 (5th Cir.1971) (freedom of speech).

[14] *See Dinsman v. Wilkes*, 53 U.S. (12 How.) 389, 13 L.Ed. 1036 (1851) (marine can sue his commanding officer for alleged unconstitutional cruel and unusual punishment); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 2 L.Ed. 243 (1804) (commander of U.S. warship liable for damages for unlawful seizure of neutral vessel even though acting on order of President).

[15] *See Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (habeas corpus review of court martial);

subject to only qualified immunity,[16] albeit this immunity is granted if military discipline would be deleteriously affected by judicial interference. *See Chappell*, —— U.S. at ——, 103 S.Ct. at 2365-66.

In conclusion, by donning a uniform, a member of the Army does not volunteer himself to be duped and deceived into becoming a guinea pig for his superiors, and consequently to be deprived of his most fundamental constitutional and human rights. The "peculiar and special relationship of the soldier to his superiors" does not permit the violation of those fundamental rights in a situation that does not involve military discipline and duty. Furthermore, although the special status of the military has required the establishment of two systems of justice, one for civilians and the other for military personnel, both must operate within the confines of the Constitution and the Bill of Rights. As explained in *Thornwell v. United*

Parisi v. Davidson, 405 U.S. 34, 92 S.Ct. 815, 31 L.Ed.2d 17 (1972) (serviceman who had applied for discharge as conscientious objector and had exhausted administrative remedies was entitled to seek habeas corpus relief in federal court); *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969) (review and reversal of lower courts denial of habeas corpus relief for soldier charged with nonservice connected wrongdoing); see cases cited *supra* note 13.

[16] *See Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (Governor, *senior and subordinate officers of state National Guard*, and state university president not absolutely immune from suit for damages under 42 U.S.C. § 1983 for military steps taken in alleged suppression of student dissent over Vietnam War); *Thornwell v. United States*, 471 F.Supp. 344 (D.D.C.1979) (high ranking military officials who were charged with violating serviceman's fifth amendment rights held not immune from suit); *infra* note 26 and accompanying text.

States, 471 F.Supp. 344 (D.D.C.1979), a case almost identical to the one at bar: [17]

> To hold that the military may deprive a civilian of his constitutional rights merely because the deprivation originated when the civilian was an enlisted man would be tantamount to declaring all veterans second class citizens. Men and women who have served in our Armed Forces, and to whom this nation is indebted beyond measurement, are certainly entitled to the constitutional liberties afforded all citizens. In short, if the military deprives a veteran of his constitutional rights, it may not look to *Feres* for immunity.

Id. at 353 (footnote omitted).

B

The *Chappell* Court, by its own admission,[18] relies on the *Feres* doctrine policy of protecting military discipline to bar a *Bivens* action. Although a small portion of the opinion intimates that the Court is sensitive to the difference between a statutory and a con-

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[17] Plaintiff Thornwell was a former serviceman who sued the United States and his former military superiors for injuries which he sustained after the Army intentionally administered LSD to him without his knowledge as part of their interrogation. The plaintiff charged, *inter alia*, that the federal officers violated his fifth amendment due process rights by concealing the drugging and failing to provide him with follow-up medical treatment. As to this count, the United States District Court for the District of Columbia held that the plaintiff's allegations stated a valid *Bivens*-type cause of action. 471 F.Supp. at 355.

[18] ". . . the Court's analysis in *Feres* guides our analysis of this case." —— U.S. at ——, 103 S.Ct. at 2365.

stitutional cause of action,[19] the decision's overall analysis appears to belie this view. Statutory and constitutional actions implicate different immunity concepts, which can sharply alter the complexion of a court's analysis. A *Bivens* claim raises questions about official immunity, while the principle of sovereign immunity often dictates the result of actions brought under the Federal Tort Claims Act. This court does not interpret *Chappell* as holding that the law and policy circumscribing statutory actions are controlling herein. Rather, the FTCA, and more specifically the *Feres* doctrine, merely influence this court's analysis of plaintiff's constitutional claim. To ensure that its position on this important point is clear, the court pauses at this juncture to examine the relationship between the *Feres* doctrine and the *Bivens* cause of action.

The *Feres* doctrine represents a judicial response to Congress' passage of the FTCA. The doctrine prevents members of the armed forces from suing the United States for injuries suffered incident to, or arising out of, military service. There *Feres* Court cited several reasons for the doctrine, some of which remain persuasive today. First, the "distinctively federal" nature of the relationship between soldiers and the government means that military personnel should not be subject to variations in state law when seeking relief.[20] Second, claims against the government are unnecessary because there already exists a comprehensive system for compensating military

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[19] "[*Chappell*] concerns the limitations on the type of non-statutory damage recognized in *Bivens*, rather than Congress' intent in enacting the Federal Tort Claims Act . . ." *Id.*

[20] *Feres*, 340 U.S. at 143, 71 S.Ct. at 158.

personnel under the Veterans Benefits Act, 38 U.S.C. § 301 et seq. (1976).[21] Third, suits against the government are barred because of the need for military discipline, which is fostered by preventing a soldier from questioning the legitimacy and propriety of an order.[22]

Completely distinguishable from a statutory action against the military barred by *Feres* is a constitutional cause of action based on *Bivens*. The source of a *Bivens* action is the Constitution; the rights protected therein are among the most valued personal liberties that citizens possess. Indeed, the Supreme Court has long recognized that a citizen has a right to relief when his constitutional rights are violated. As Chief Justice John Marshall observed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803), "[t]he very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws." The *Bivens* Court logically extended this principle to include a citizen's right to sue federal officers for alleged violations of the former's constitutional rights. 403 U.S. at 397, 91 S.Ct. at 2005. The federal courts have the power to award damages to a litigant in a *Bivens* claim absent con-

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[21] 340 U.S. at 145, 71 S.Ct. at 159. *But cf. United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954). In *Brown*, the Court found that the availability of relief under the Veterans Act, ch. 102, § 31, 48 Stat. 526 (1934) (current version at 38 U.S.C.A. § 351 (1979)), did not preclude recovery against the Government under the FTCA, too. 348 U.S. at 114, 75 S.St. at 144 (reaffirming *Brooks v. United States*, 337 U.S. 49, 53, 69 S.Ct. 918, 920, 93 L.Ed. 1200 (1949)).

[22] *See, e.g., Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673, 97 S.Ct. 2054, 2058-59, 52 L.Ed.2d 665 (1977).

gressional authorization,[23] and such actions can be implied under the Fifth Amendment.[24]

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[23] *Bivens*, 403 U.S. at 397, 91 S.Ct. at 2005. The plain and obvious language of post-*Bivens* Supreme Court decisions easily dispenses with the *Chappell* Court's undocumented assertion that federal courts lack the authority to provide damage remedies for constitutional violations in the absence of congressional approval. —— U.S. at ——, 103 S.Ct. at 2367. For example, in *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), a case involving the scope of immunity afforded federal executive officers, Justice White counselled:

> The presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution. . . . Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages, and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim.
>
> But once this analysis is completed, there is no reason to return again to the absence of congressional authorization in resolving the question of immunity.

Id. at 503, 98 S.Ct. at 2909 (citations omitted). Lest there be any doubt that the federal courts can authorize a *Bivens* remedy when faced with congressional silence, the court urges review of Justice Harlan's concurrence in *Bivens*, 403 U.S. at 398, 91 S.Ct. at 2005; *see James v. United States*, 358 F.Supp. 1381, 1386-87 (D.R.I.1973).

[24] *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (action against congressman for sex discrimination); *Thornwell v. United States*, 471 F.Supp. 344, 353-55 (D.D.C.1979) (military surreptitiously administered LSD to soldier in violation of his fifth amendment rights); *see also Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (eighth amendment).

In *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 I Ed.2d 15 (1980), which involved a claim by a mother on behalf of her deceased son against federal prison officials who were alleged to have intentionally deprived him of necessary medical care, the Supreme Court recognized another important difference between the *Bivens* and FTCA actions: the constitutional remedy is more effective. The Court adduced four reasons for this conclusion:

> First, the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States.
>
> . . . . .
>
> Second, our decisions . . . indicate that punitive damages may be awarded in a *Bivens* suit. . . . But punitive damages in an FTCA suit are statutorily prohibited. 28 U.S.C. § 2674. Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts.
>
> Third, a plaintiff cannot opt for a jury in an FTCA action, 28 U.S.C. § 2402, as he may in a *Bivens* suit. . . .
>
> Fourth, an action under FTCA exists only if the state in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. 28 U.S.C. § 1346(b). Yet it is obvious that the liability of federal officials for violations of citizen's constitutional rights should be governed by uniform rules.

Carlson, 446 U.S. at 21-23, 100 S.Ct. at 1472-74. Rather than allow federal officials to act beyond the scope of their authority with impunity, the *Bivens*

action checks the exercise of that power and serves as "an important means of vindicating constitutional guarantees." *Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978).[25] Because of these differences, the *Bivens* and FTCA actions are distinguishable.

Extending the *Feres* analysis to a *Bivens* claim blurs the distinction between statutory and constitutional actions. Without delineating between the two,

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[25] Courts critical of the *Bivens* remedy charge that the deterrent value of the action has a "chilling effect" on the exercise of discretionary power by government officials and, therefore, the constitutional action hinders not only improper conduct, but proper conduct, too. *See Jaffee v. United States*, 663 F.2d 1226, 1234 (3d Cir. 1981). Although this criticism has merit in a military setting in which orders must be obeyed reflexively, it has no application where, as here, military discipline is not involved. Instead, the instant case presents a rather straight-forward question of whether fundamental constitutional rights take precedence over government discretionary power. This court answers in the affirmative.

Admittedly, in order for government to function properly, its officials must be free to exercise discretionary authority. However, the Framers of the Constitution recognized that discretionary authority left uncontrolled can become oppressive, so they drafted the Bill of Rights to check government power and protect individual liberties. L. Tribe, American Constitutional Law § 1-2, at 3 n. 7 (1978) (relying on 14 The Papers of Thomas Jefferson 659 (J. Boyd ed. 1958)). The presumption born of the first ten amendments is that government conduct violative of an individual's constitutionally-protected rights is invalid. Translated into practical terms, this means that in a military setting in which discipline is not relevant, government officers cannot secretly administer drugs to members of the armed forces in violation of their constitutional rights. If the *Bivens* action has a "chilling effect" on this type of individual conduct, then so be it. After all, no less an authority than the Bill of Rights requires such a result.

a court might grant *official* immunity to officers in the military based on reasoning that heretofore has sustained only federal *sovereign* immunity. While sovereign immunity has constitutional underpinnings and is as absolute as Congress may intend, official immunity is judge-made and generally is qualified.[28]

In order to avoid obscuring the concepts of sovereign and official immunity, *Chappell* counsels that the *Feres* doctrine "guides," but does not dictate, the outcome of a *Bivens* action arising out of an intra-military dispute. The Court reasons that if the *Feres* doctrine applies, then military officers may be subject to qualified immunity from suit. As explained above, however, the *Feres* doctrine is not controlling in the instant case because the discipline of military subordinates is in no way implicated by the facts. Thus, in holding that the plaintiff's *Bivens* action is viable, this court is faithful to the rule in *Chappell* while remaining sensitive to the distinction between a statutory and a constitutional cause of action.

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[28] Virtually every federal or state officer is subject to qualified immunity. *See Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (Secretary and Assistant Secretary of Agriculture); *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) (state non-judicial officials); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (governor and officers in National Guard). Although qualified immunity is the rule, the Supreme Court has recognized that there are some officials whose special functions require a full exemption from liability. *See Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (state prosecutor); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) (state judge); *Yaselli v. Goff*, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927), *aff'g* 12 F.2d 396 (2d Cir.1926) (federal prosecutor); *Bradley v. Fisher*, 13 Wall 335, 20 L.Ed. 646 (1872) (federal judge).

C

Under the *Bivens* analysis, the implication of a constitutional cause of action also may be precluded when Congress has explicitly provided an adequate alternative remedy. The *Chappell* Court devotes little space to this issue; in fact, nowhere in the opinion does the Court even mention this second exception to a *Bivens* action. The Court does point out, however, that military personnel can bring their complaints before a military tribunal, and that such bodies can award retroactive back pay and promotions. *Chappell*, —— U.S. at ——, 103 S.Ct. at 2367.

Such remedies are meaningless in the instant case. The constitutional wrong complained of by Mr. Stanley is impossible to correct. The plaintiff does not claim that the Army cheated him out of either money or a promotion. Rather, he alleges that the Army has knowingly deprived him of the ability to appreciate and enjoy his life; that for the past twenty-five years, he has suffered—and continues to suffer—from serious mental illness and severe physical pain. Amended Complaint ¶¶ 5, 8 (filed Apr. 29, 1981).

Having differentiated between the alternative remedies available in *Chappell* and the instant case, the court would be content to stop here. However, the need for clarity in this case compels the court to explain in greater detail why no alternative remedies exist that would preclude the plaintiff's *Bivens* action.

There are two, mutually dependent, elements to the alternative remedy exception. The first element requires proof that Congress has provided an alternative remedy which it *explicitly* declared to be a substitute for recovery under the Constitution. *Bivens*,

403 U.S. at 397, 91 S.Ct. at 2005; *see Carlson v. Green*, 446 U.S. 14, 19-20, 100 S.Ct. 1468, 1472, 64 L.Ed.2d 15 (1980); *Davis v. Passman*, 442 U.S. 228, 246-47, 99 S.Ct. 2264, 2278, 60 L.Ed.2d 846 (1979). An essential aspect of this element is that Congress must expressly intend for the alternative remedy to replace, rather than to complement, the *Bivens* remedy. *Carlson*, 446 U.S. at 19 n. 5, 100 S.Ct. at 1472 n. 5. The second independent requirement for this exception to apply is that the remedial scheme must be *equally as effective* as the damages action. *Id.* at 18-19, 100 S.Ct. at 1471-72.

The only alternative remedy that satisfies the element of the exception is the Veterans Benefits Act, 38 U.S.C. § 301 et seq. (1976) ("VBA"). Although the Third and Fifth Circuits have concluded that the VBA preempts a private action against the military for damages based on the Constitution, *see Gaspard v. United States*, 713 F.2d 1097 (5th Cir. 1983); *Jaffee v. United States*, 663 F.2d 1226, 1245-46 (3d Cir. 1981), neither of these decisions applied the *Bivens/Carlson* analysis.

The *Jaffee* court fundamentally modified the alternative remedy test by not requiring "an explicit Congressional declaration of the exclusivity of veterans' compensation." 663 F.2d at 1243. In *Gaspard*, the court ignored the *Bivens/Carlson* standard altogether. While the Fifth Circuit found the VBA to be an "exclusive" and "comprehensive" remedy, 713 F.2d at 1102, 1105, no consideration was given, as *Carlson* requires, to whether the statutory claim is "as effective" a remedy as the *Bivens* action itself. Moreover, the *Gaspard* court did not find, as *Bivens* requires, that Congress had "explicitly declared" the VBA to

be an exclusive remedy.[27] This court is not prepared to alter so radically the standard established in *Bivens* and reaffirmed in *Carlson*, especially since the *Chappell* Court was presented with the issue and basically elected to ignore it.[28]

Admittedly, the legislative history of the VBA indicates that Congress has assumed some responsibility for insuring adequate compensation for service-related injuries, S.Rep. No. 94-1226, 94th Cong., 2d Sess. 10, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2537, 2541. Yet nowhere in the legislative history or the statutory language of the VBA itself does the Congress "explicitly declare" that the VBA is to replace a money damages action.[29] This is particu-

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[27] The Fifth Circuit has not hesitated to apply the "explicit declaration" standard in the past. For example, in *Garcia v. United States*, 666 F.2d 960 (5th Cir.1982), the court observed that "a *Bivens* action may . . . be defeated . . . when defendants show that Congress has provided an equally effective alternative remedy which it *explicitly* declared to be a substitute for recovery directly under the Constitution." *Id.* at 965 (emphasis added).

[28] In a case decided the same day as *Chappell*, *Bush v. Lucas*, —— U.S. ——, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), the Supreme Court was confronted with a *Bivens* claim brought by a federal civilian employee against his supervisor. Unlike *Chappell*, the *Lucas* Court reviewed the *Bivens/Carlson* test and, significantly, left the "explicit declaration" standard intact. —— U.S. at ——, 103 S.Ct. at 2411.

[29] *Lucas* provides an insight into the type of legislative history and statutory language that is necessary to warrant a finding that a congressionally-imposed remedial scheme is to be an exclusive remedy. The issue before the Court in *Lucas* was what legal remedies are available to a government civil servant who is the victim of a retaliatory demotion or discharge because he has exercised his first amendment rights. The Court posited that for a congressional remedy to be the sole source of relief, the Congress must so indicate "by statu-

larly significant because Congress follows the practice of expressly stating when it intends to make a legislative remedy exclusive. *See* 10 U.S.C.A. § 1089(a) (1983); 38 U.S.C.A. § 4116(a) (1979); 42 U.S.C.A. § 233(a) (1982); 42 U.S.C.A. § 2458a (West Supp. 1983).[20] None of the decisions which have found the VBA to be an exclusive remedy for servicemen seeking compensation for injuries sustained while in the military have reconciled their result with this congressional practice. *See Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464, 100 S.Ct. 647, 650, 62 L.Ed.2d 614 (1980) (relying on *Stencel Aero Engineering Co. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977)); *Gaspard v.*

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tory language, by clear legislative history, or perhaps even by the statutory remedy itself. . . ." —— U.S. at ——, 103 S.Ct. at 2411. In light of the "elaborate remedial system" enacted by Congress to handle challenges to agency personnel decisions, *id.* 103 S.Ct. at 2416, the Court concluded that Congress, and not the federal courts, is better equipped to prescribe the scope of relief that is made available to federal employees whose constitutional rights have been violated by their supervisors. Pursuant to the guidelines announced in *Lucas*, this court has reviewed the legislative history and statutory language of the VBA, and finds that neither clearly indicates that Congress intended for the compensation scheme therein to be an exclusive remedy. At most, Congress intended for the VBA "to provide relief for the impaired earning capacity of veterans disabled as a result of their military service," S.Rep. No. 94-1226, 94th Cong., 2d Sess. 39, *reprinted in* 1976 U.S.Code Cong. & Ad.News 2537, 2565, leaving it to the courts to fashion a remedy that would encourage individual accountability.

[20] In each of the legislative sections cited, the Congress has declared that the remedies therein "shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter. . . ."

United States, 713 F.2d 1097 (5th Cir. 1983); *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 1772, 76 L.Ed.2d 344 (1983); *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981); *Carter v. City of Cheyenne*, 649 F.2d 827 (10th Cir. 1981). But *see supra* note 21. Furthermore, cases such as *Stencel*, *Scales*, and *Carter* are distinguishable from the instant case because they involved statutory actions against the Government, and not constitutional actions against federal officers.

In a statutory claim against the Government, the legislature has created the action and, appropriately enough, delineates the available remedies. The remedies are declared exclusive as the necessary tradeoff for making the sovereign liable for wrongdoing. Thus, an injured serviceman suing the Government under the FTCA is assured a "swift, efficient remedy," and the Government itself basically remains protected from unlimited liability by the Act's limitation-of-liability provisions. *Stencel*, 431 U.S. at 673, 97 S.Ct. at 2058 (quoting *Cooper Stevedoring Co. v. Kopke, Inc.*, 417 U.S. 106, 115, 94 S.Ct. 2174, 2179, 40 L.Ed.2d 694 (1974)).

Legislative relief is neither an exclusive nor an adequate means of compensating a person whose constitutional rights were violated by federal officers. To begin with, a *Bivens* action does not threaten to expose the Government to broad liability because a federal officer, and not the Government, is the party charged with wrongdoing. Additionally, the *Bivens* cause of action seeks to hold a federal officer accountable for his actions, *supra* pp. 483-484, while the statutory action in *Stencel* and similar cases is designed to insure "simple, certain, and uniform compensation." *Jaffee v. United States*, 663 F.2d 1226,

1232 (3d Cir. 1981) (interpreting the VBA and quoting from *Feres*). In fact, the Supreme Court has recognized that the VBA is nothing more than a no-fault compensation scheme that substitutes for tort liability. *Stencel*, 431 U.S. at 672, 97 S.Ct. at 2058; *see Lombard v. United States*, 690 F.2d 215, 219 (D.C. Cir. 1982). In short, the VBA should be viewed as fully adequate only in combination with the *Bivens* remedy.

Other reasons suggest that the VBA does not pass judicial scrutiny under the *Bivens/Carlson* standard. Initially, even after passage of the VBA, money damages could still be recovered under state tort law for intentional and negligent torts. If the VBA was to be meant as an exclusive remedy, then why did not Congress close this legal loophole? Furthermore, given the plethora of suits involving servicemen seeking judicial review of their intramilitary disputes,[81] why has Congress neither clarified the status of nor

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[81] Examples include suits over atomic testing, *see Jaffee v. United States*, 592 F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979); *Gaspard v. United States*, 544 F.Supp. 55 (E.D.La.1982), *aff'd*, 713 F.2d 1097 (5th Cir.1983), and the Army's spraying of the herbicide Agent Orange in Vietnam, *see In re "Agent Orange" Product Liability Litigation*, 506 F.Supp. 762 (E.D.N.Y.), *rev'd*, 635 F.2d 987 (2d Cir.1980), *cert. denied sub nom., Chapman v. Dow Chemical Co.*, 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981). One article surveying the subject area reports that "[p]resently, there are more than one thousand pending lawsuits alleging constitutional violations." Madden, Allard, & Remes, *Bedtime for* Bivens: *Substituting the United States as Defendant in Constitutional Tort Suits*, 20 Harv.J. on Legis. 469, 473 (1983) (footnote omitted) [hereinafter cited as *Bedtime for* Bivens].

expressly barred money damages claims when confronted with this issue? [32]

Even if the VBA is deemed to be an alternative remedy which Congress has explicitly declared to be a substitute for recovery under the Constitution, this court finds that it is not "an *equally* effective remedial scheme." *Carlson*, 446 U.S. at 22 n. 10, 100 S.Ct. 1468 n. 10. An alternative remedy, to be equally effective in this case, must accomplish two objectives: it must make the complainant whole and deter future such abuses of power.[33] The court remains uncertain whether the Veterans Administration's (VA) system of benefits is equipped to satisfy the plaintiff's demand for relief. Additionally, shifting the responsibility for compensating Mr. Stanley from the federal officers involved to the VA has little deterrent value to the individuals, and all but declares that military officers can violate the most basic of our constitutional rights with impunity.

IV

After lengthy analysis, the court concludes that the Supreme Court's decision in *Chappell v. Wallace*, —— U.S. ——, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), is inapposite, and that the plaintiff has a viable *Bivens*-type cause of action against individual agents and

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[32] If Congress wanted to make veterans' benefits an exclusive remedy, then it could so state in at least one annual appropriation bill that funds the VBA. Like its predecessors, the Ninety-eighth Congress has taken up the question of whether sovereign immunity should bar a constitutional tort claim against military officials. And, like its precedessors, final, if any, action on the proposed bills will not occur during this session. For an account of this legislative activity, see *Bedtime for* Bivens, *supra* note 31 at 475-77.

[33] *See id.* at 475 & n. 19.

officers of the United States who participated in the LSD experiments.

By way of review, the overbroad statements in *Chappell* must be read in the context of the facts and analysis of the opinion. A careful examination of *Chappell* proves that, at most, the Supreme Court has decided to bar *Bivens* actions brought by servicemen against their superiors if the alleged wrongdoing occurred during active duty and was incident to the execution of military orders. Couched in these terms, the holding in the case at bar displays the proper deference to *Chappell*, yet preserves the sworn duty of this court to be heard when the Government's egregious behavior violates the law by victimizing the very people that it asks to defend it.

Constitutional law scholar Archibald Cox has written that for the law to have true authority and precedential value, it must "meet the needs of men and match their ethical sensibilities." A. Cox, The Role of the Supreme Court in American Government 110 (1976). As has been demonstrated, any decision by this court strictly and literally applying the holding of *Chappell* to the instant case, of necessity, would crumble under the weight of legal and moral scrutiny. This court has seen few cases which more desperately cry out for and demand judicial redress. The acts alleged to have been committed by the officers and agents named as defendants in this case are insidious to the most fundamental rights protected by our Constitution: the right of an individual to control his mind, his private thoughts, and his bodily integrity. To deny Mr. Stanley a judicial forum is to strip the court of its most important function—to ensure that the plaintiff is accorded justice under the law.

This court reiterates the words of Chief Justice Earl Warren, as quoted in the *Chappell* decision: "'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.'" —— U.S. at ——, 103 S.Ct. at 2367 (citing Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962)). Accordingly, this court, having found that the special factors existing in *Chappell* are not applicable to this case, and that no special factors exist dictating against a *Bivens*-type action, refuses to conclude that the *Chappell* decision precludes a *Bivens*-type cause of action by the plaintiff Stanley.

The prior order herein denying in part the defendants' motion to dismiss is hereby ratified and confirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
S.D. FLORIDA

No. 78-8141 CIV-GONZALEZ

JAMES B. STANLEY, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Aug. 3, 1984

ORDER OF CLARIFICATION

GONZALEZ, District Judge.

THIS CAUSE has come before the Court for review *sua sponte* upon examination of its order entered October 28, 1983 and cited at 574 F.Supp. 474 (S.D.Fla.1983). By this order, the Court seeks to correct two scrivener's errors in the text of the opinion. It shall be

ORDERED AND ADJUDGED that:

1. At 574 F.Supp. at 483, col. 1, line 8 (slip op. page 14, line 8) the word "There" be changed to "The".

2. At 574 F.Supp. at 485, col. 2, line 25 (slip op. page 18, line 16) the word "independent" be changed to "dependent".

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APPENDIX D

UNITED STATES DISTRICT COURT
S.D. FLORIDA, N.D.

Civ. A. No. 78-8141-CIV-JAG

JAMES B. STANLEY, PLAINTIFF

v.

CENTRAL INTELLIGENCE AGENCY, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES ARMY, UNITED STATES OF AMERICA, UNKNOWN INDIVIDUAL FEDERAL AGENTS AND OFFICERS, DEFENDANTS

Nov. 9, 1982

ORDER

GONZALEZ, District Judge.

This matter having been opened to the Court by the United States' Motion For Partial Final Judgment and Suggestion Of Interest.

And the Court having considered the United States' Motion for Partial Final Judgment and Suggestion Of Interest, and further, having reviewed the United States' previously-filed Motion to Dismiss or in the Alternative for Summary Judgment and Plaintiff's Opposition thereto, and further, having reconsidered

this Court's Order of October 15, 1982, 549 F.Supp. 327,

And the Court having found and determined that the United States' Motion For Partial Final Judgment and Suggestion Of Interest are well taken,

IT IS on this 9th day of November, 1982, ORDERED:

That there is no just reason for delay in expressly directing the entry of judgment in favor of the United States and that such relief is HEREBY GRANTED and it is

FURTHER ORDERED that the clerk enter final judgment in favor of the United States forthwith, and it is

FURTHER ORDERED that this Court's October 15, 1982 Order ruling on plaintiff's claims against individual defendants is hereby vacated and withdrawn; and it is

FURTHER ORDERED that unless plaintiff identifies and serves at least one individual defendant by his correct name within ninety (90) days, claims against individual defendants shall be dismissed on the Court's own motion.

APPENDIX E

UNITED STATES DISTRICT COURT
S.D. FLORIDA, N.D.

No. 78-8141-CIV-JAG.

JAMES B. STANLEY, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Oct. 15, 1982

Opinion Vacated Nov. 9, 1982
See 552 F.Supp. 619

ORDER

GONZALEZ, District Judge.

THIS CAUSE has come before the Court upon the Defendants' Motion to Dismiss or in the alternative Motion for Summary Judgment. The Court has considered the motion, and has heard extensive oral argument by counsel.

The case involves the secret administration of LSD to members of the U.S. Army as part of an Army experiment.

In 1958 plaintiff was a Master Sergeant in the United States Army stationed at Fort Knox, Kentucky. Plaintiff volunteered to participate in a program at the Chemical Warfare Laboratories at the Army Chemical Center, Aberdeen Proving Grounds, Edgewood Arsenal, Maryland. The purpose of the program allegedly was the development and testing of methods of defense against chemical warfare attack, including the testing of various gas masks and protective clothing.

During interviews with military and civilian personnel at Edgewood Arsenal, plaintiff was asked to drink a clear liquid which, unknown to him, contained lysergic acid diethylamide (LSD). Plaintiff unknowingly ingested this drug on four separate occasions. Plaintiff alleges that as a result he experienced severe reactions including hallucination. When he returned to active duty at Fort Knox a month later he maintains he was in an altered behavioral and emotional state.

Plaintiff was discharged from the Army in 1969 still unaware that he had ingested LSD years earlier. In December, 1975, he received a letter from the Department of the Army, Walter Reed Army Medical Center, soliciting his participation in a followup study of the subjects of the 1958 LSD experiments. It was then that he first became aware that he had secretly been given LSD in 1958 by Army personnel.

In his Amended Complaint, plaintiff alleges that the defendants deliberately gave him false information regarding the true nature of the program he volunteered to participate in. He further alleges that the Defendants were grossly negligent in failing to debrief and inform him of the 1958 episode upon his discharge, and in failing to continue to monitor his

condition subsequent to his discharge. Plaintiff seeks damages for this allegedly negligent conduct.

The original complaint in this case was based on the same set of facts and consisted of claims brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346 (b) and 2671, *et seq.* The question of this court's jurisdiction over those claims was first raised on a motion for summary judgment. This court granted said motions on the basis of the doctrine announced in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). The *Feres* doctrine provides that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159.

Upon review of that ruling, the Fifth Circuit concluded that this court's application of the *Feres* doctrine to preclude the claims brought in the original complaint was correct, but that this court improperly granted the motion for summary judgment. *Stanley v. CIA*, 639 F.2d 1146 (1981). Rather, the Fifth Circuit held that the proper disposition of the case was dismissal of the complaint for lack of subject matter jurisdiction. The Fifth Circuit then remanded the case for the trial court's consideration of any amendment that the plaintiff might offer to cure the jurisdictional defect. *Id.* at 1159-60.

The first question now presented upon the Defendant's Motion to Dismiss the Amended Complaint is whether Plaintiff's Amended Complaint states a cause of action under the Federal Tort Claims Act (FTCA) *not* barred by the *Feres* doctrine.

The defendant argues that the Fifth Circuit, in *Stanley*, precluded any question of whether Stanley could allege a cause of action under the FTCA.

Although the court finds that the Fifth Circuit left the door open to Stanley to amend his complaint to allege facts sufficient to support a post-discharge tort theory, (so his claims could fall outside the *Feres* doctrine pursuant to *Thornwell v. United States*) the Court finds that the plaintiff has failed to allege a distinct tort arising entirely post-discharge. *See Thornwell v. United States*, 471 F.Supp. 344 (D.D.C. 1979). (*Feres* doctrine does not bar claims arising from conduct occurring entirely post-discharge).

The court reaches this conclusion by examining the reasoning of the Fifth Circuit and its reliance on *Schnurman v. United States*, 490 F.Supp. 429 (E.D. Va.1980). *Stanley*, 639 F.2d at 1155.

In *Schnurman*, the plaintiff suffered injuries as a result of his exposure to toxic mustard gases during a United States Navy experiment in which he participated while an apprentice seaman. The *Schnurman* court granted the defendant's renewed motion to dismiss at the end of the trial finding (a) that the plaintiff's injuries were not shown to be caused in any way by the Government's failure to treat plaintiff subsequent to discharge; or (b) by the Government's failure to warn him of the true nature of the gas to which he had been exposed. There was no testimony that his injuries were in any way aggravated or multiplied by the Government's alleged post-discharge negligence, or that follow-up treatment could have avoided any long-term effects of the exposure. *Schnurman*, 490 F.Supp. at 437. The *Schnurman* court found no evidence of any causal connection between the plaintiff's injury and the Government's alleged *post-discharge* negligence, and held that to allow recovery for the defendants' failure to monitor and

treat injuries which resulted from an *in-service* tort (for which there is no recovery) would leave very little of *Feres* immunity. *Id.*

Plaintiff Stanley's Amended Complaint alleges that "Upon and subsequent to Plaintiff's discharge from the army in 1969 Defendants were grossly negligent in failing to debrief and inform Plaintiff to the [LSD experiment] and in failing to continue to monitor his condition . . ." and that he suffers continuing and permanent psychological injuries as a result of Defendant's negligent failure to debrief him and to continue to monitor his condition. The Plaintiff does not causally connect the injuries resulting from the experiment with any conduct occurring *in its entirety* after Plaintiff's discharge. Although Plaintiff omits allegations of predischarge negligence in his Amended Complaint the court is not persuaded that the acts constituting the alleged negligence were separate and distinct from any acts occurring before discharge, so as to give rise to a separate actionable tort not barred by the *Feres* doctrine.

The court, therefore, concludes that plaintiff's claims under the FTCA must be dismissed for lack of subject matter jurisdiction based upon the Fifth Circuit's opinion in *Stanley*, including its reliance on *Schnurman v. United States*.

The Amended Complaint also alleges constitutional claims based on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). While the court recognizes that a *Bivens* cause of action is available against individual officers and agents of the Government, the doctrine of sovereign immunity bars an action against the United States itself.

The question of whether a *Bivens* cause of action can be brought against the Government was addressed

by the United States Court of Appeals for the Third Circuit in *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979). In *Jaffee*, plaintiff claimed damages for injuries suffered as a result of radiation exposure while serving in the United States Army when assigned to participate in nuclear testing. The court, after concluding that Jaffee's claim could not be brought under the FTCA because of the *Feres* doctrine, proceeded to consider whether a cause of action could be brought against the Government pursuant to *Bivens*.

> Alternatively, Jaffee urges that this court can create an exception to the doctrine [of sovereign immunity] in order to grant relief for deliberate violation of constitutional rights. For authority supporting this argument, he turns to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and to *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). In *Bivens* the Court recognized an implied cause of action for damages against federal officers who had violated the fourth amendment. *Butz* held that certain federal executive officials did not enjoy an absolute immunity for the damage suits permitted by *Bivens*. From these cases Jaffee tries to extract the principle that "the applicable common law doctrine of governmental immunity must yield to the paramount necessity of vindicating constitutional guarantees." But the suits in *Bivens* and *Butz* were against individual federal officers and not against the United States. Because Jaffee has sued the Government itself, *Bivens* and *Butz* do not afford

> him a traversable bridge across the moat of sovereign immunity.

Jaffee, 592 F.2d 712, 717 (footnotes omitted). This court finds, therefore, that the plaintiff's *Bivens* claims herein cannot be maintained against the Government itself.

The Defendants' Motion to Dismiss also attacks the *Bivens*-type claims brought against the Unknown Individual Federal Agents and Officers. Defendants first argue that fictitious individual defendants are not proper parties. This argument is without merit. *See, e.g., Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982).

Defendants next argue that even if plaintiff has properly pled a *Bivens* cause of action against individual agents and officers, such claim is barred by the *Feres* doctrine.

The *Feres* case itself dealt exclusively with claims brought under the Federal Tort Claims Act. *See Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152. It did not address *Bivens*-type actions.

At least one United States Court of Appeals has held that although a claim against the Government under the FTCA may be barred by the *Feres* doctrine, a *Bivens* claim against individuals arising from the same set of facts is not barred by *Feres*. *See Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981). This court likewise holds that the *Feres* doctrine does not bar plaintiff's claims against the individual agents and officers.

The defendants also attack the Amended Complaint on the ground that the claims against the individual

defendants are time-barred. They contend that the applicable statute of limitations, the four-year period for actions involving negligent and intentional torts, Fla. Stat. § 95.11(3)(a) and (*o*), began to run in 1975 when plaintiff was first informed that he had been given LSD. Because the original complaint did not name individual defendants, defendants argue that the Amended Complaint cannot relate back to the original complaint as regards the individuals.

It is unnecessary for this Court to address the issue of relation-back. At the time plaintiff filed his original complaint the Fifth Circuit held a restrictive position as to causes of action brought pursuant to *Bivens*. *Stanley v. CIA*, 639 F.2d at 1156 n.12; *see Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978) (no right of action may be implied from the Due Process Clause of the fifth amendment). Thus, until the Supreme Court reversed the Fifth Circuit in *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), Stanley had no *Bivens* cause of action. As a result, the claims against the individuals in this case, which are based primarily on the Fifth Amendment, did not accrue until the Supreme Court's decision in 1979. It follows, therefore, that the claims against the individual officers and agents set forth in the Amended Complaint are not time-barred. *See United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972) (Because appellant had no reasonable probability of successfully prosecuting his claim prior to the enunciation of a new rule by the United States Supreme Court, for statute of limitations purposes the cause of action accrued on the date of the Supreme Court's decision); *United States v. LePatourel*, 593 F.2d 827 (8th Cir. 1979).

Finally, defendants argue that plaintiff's claim does not rise to one of constitutional magnitude, and counsels the court to exercise hesitation in recognizing a *Bivens* cause of action. Defendants characterize plaintiff's claim as "nothing more than a medical malpractice action based on lack of informed consent and negligent follow-up care."

The Supreme Court of the United States has recognized that there is a constitutional right to be free to decide for oneself whether to submit to drug therapy. *Mills v. Rogers*, —— U.S. ——, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982). Although it is difficult to locate the exact constitutional source of this right, courts have recognized it as a liberty or privacy interest associated with the penumbral right to privacy, bodily integrity, or personal security. *See Mills v. Rogers*, —— U.S. at —— & n. 7, 102 S.Ct. at 2447 & n. 7. This right to be free from the unwanted administration of drugs has also been associated with First Amendment rights because "the power to produce ideas is fundamental to our cherished right to communicate . . ." *See Mills v. Rogers*, —— U.S. at —— n. 3, 102 S.Ct. at 2446 n. 3.

This court views the conduct alleged in the Amended Complaint as an egregious intrusion on the most precious right protected by the Constitution—the right not to be deprived of life, liberty or property without due process of law. The surreptitious administration of LSD to an unwitting serviceman who believes he is involved in a project important to the development of defenses to chemical warfare constitutes a violation of the rights of privacy and bodily integrity, and of the right of an individual to control his mind, his private thoughts and his intellectual process.

It is ludicrous to suggest that such an intrusion upon a person by the federal government does not rise to a claim of constitutional magnitude, but is merely a medical malpractice claim.

In *Mills v. Rogers, supra,* the Supreme Court recognized that the unwanted administration of drug therapy by a state hospital to mental patients warranted constitutional scrutiny to determine whether the state's competing interests outweigh the individual's constitutionally protected interest in being free from such conduct. —— U.S. at ——, 102 S.Ct. at 2447. The deplorable nature of such conduct is multiplied by the facts in this case. The LSD was administered to the plaintiff by agents of the same government that guarantees the plaintiff his personal right to be free from such conduct, and whose constitutional duty it is to protect such personal interests. Moreover, it is the same government that lured the plaintiff into believing he was playing an important role in the defense of that government, and for which he presumably was acting out of an extreme sense of loyalty and duty. The conduct alleged in this case would shock—if not outrage—the conscience of any court, and is most certainly protected against by the Constitution of the United States.

Although the Court recognizes that the military relationship between Stanley and the officers and agents involved in the LSD experiments must be weighed against the individual's constitutional rights in order to determine whether a cause of action is maintainable in this case, the court cannot legally or morally find that relationship sufficient to overcome the liberty and privacy rights guaranteed by the Constitution. To do so would deprive the plaintiff and all military personnel similarly situated of any recourse

against the government or its agents, and thus would deprive them of their most fundamental civil rights.

In summary, it is ORDERED AND ADJUDGED as follows:

1. That as to the claims against the Government brought under the Federal Tort Claims Act, the Motion to Dismiss be and the same is hereby GRANTED.
2. That as to the claims against the Government brought pursuant to *Bivens*, the Motion to Dismiss be and the same is hereby GRANTED.
3. That as to the claims against the UNKNOWN INDIVIDUAL FEDERAL AGENTS AND OFFICERS, the Motion to Dismiss be and the same is hereby DENIED.

It is FURTHER ORDERED AND ADJUDGED that, pursuant to 28 U.S.C. § 1292(b), the Court finds that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Furthermore, should either of the parties file a Notice of Appeal of this Order, there shall be a stay of the proceedings in this cause until further Order of the Court.

APPENDIX F

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT B

No. 79-2571

JAMES B. STANLEY, PLAINTIFF-APPELLANT

v.

CENTRAL INTELLIGENCE AGENCY; UNITED STATES DEPARTMENT OF DEFENSE; U.S. ARMY,
DEFENDANTS-APPELLEES

March 16, 1981

Appeal from the United States District Court
for the Southern District of Florida

Before GODBOLD, Chief Judge, and TUTTLE and HILL, Circuit Judges.

TUTTLE, Circuit Judge:

Appellant James B. Stanley appeals from the district court's granting of summary judgment in favor of defendant. Appellant brought suit against the United States [1] under the Federal Torts Claims Act,

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[1] Plaintiff's original complaint, filed May 8, 1978, named as defendants the Central Intelligence Agency, the United States

28 U.S.C. § 1346(b), § 2671 *et seq.* to recover for injuries sustained allegedly as a result of defendant's negligent administration of a chemical warfare experimentation program in which Stanley was a participant. The district court found that Stanley's injuries arose out of activity incident to military service and held, therefore, that the claim was barred by the *Feres* doctrine.

Three issues are raised on this appeal. The first is whether the district court correctly found that Stanley's claims were for injuries incurred while engaging in activity incident to service and thus within the ambit of the *Feres* doctrine. The second issue is whether Stanley alleged a cause of action based on injuries sustained subsequent to his discharge. Finally, we must decide whether the district court properly ordered the entry of summary judgment rather than dismissing the case for lack of subject matter jurisdiction. We find that the trial court correctly applied *Feres* and held the United States immune to all of Stanley's claims under the Federal Tort Claims Act, since all of his injuries arose while he was engaged in activity incident to his military service. However, we reverse the granting of summary judgment, as we find that, once having found the *Feres* doctrine applicable, the district court should have dismissed the case for lack of subject matter jurisdiction.

I. FACTS

In February, 1958, appellant was a Master Sergeant in the United States Army, stationed with his wife and children at Fort Knox, Kentucky. Respond-

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Department of Defense and the U.S. Army. Subsequently, plaintiff's motion to amend the complaint to name the United States Government as a party defendant was granted.

ing to a posted notice, appellant volunteered to participate in an Army program allegedly intended to aid the Army in developing and testing methods of defense against chemical warfare.[2] He was assigned to the Army base at Edgewood Arsenal, Aberdeen, Maryland. There, during the course of clinical testing, he was given Lysergic Acid Diethylamide (commonly known as LSD) without his knowledge.

Appellant claims that the defendants were negligent in several respects in their administration of the program.[3] Primarily, appellant points to their alleged

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[2] The statutory basis for the program was the Organization of the Army Act of 1950 (64 Stat. 322, 5 U.S.C. § 235a) which authorized the Secretary to conduct research and development programs related to activities of the Army. On February 26, 1953, the Secretary of Defense promulgated a memorandum to the service secretaries setting forth policy concerning use of volunteers in research. On November 3, 1955, the Secretary of the Army issued General Order No. 64 authorizing and directing the Director of Research and Development to act for the Secretary in matters of research and development. On May 17, 1956, the Director of Research and Development approved a program for the use of volunteers in psychochemical research, including defense against the chemical warfare use of Lysergic Acid Diethylamide.

[3] The complaint specifically alleged negligence in the following respects: (1) Defendants knew or should have known that LSD is a consciousness and behavior altering drug capable of producing irreparably harmful results, including death, and that the drug would affect different persons in different, unpredictable ways; (2) Defendants breached their duty to warn Plaintiff; (3) Defendants failed to take adequate precautions; (4) Defendants negligently failed to debrief Plaintiff after administering the drug to advise of the potentially hazardous physiological and psychological effects; (5) Defendants negligently failed to continue to monitor the Plaintiff following the experiment; (6) Defendants negligently failed to obtain Plaintiff's informed consent.

negligence in their administration of LSD to human subjects, their failure to obtain his informed consent to participate in the experiment, and their failure to debrief and monitor him after the test. Appellant claims that he suffered, as a result of this negligence, severe physical and mental injuries which caused him continual problems in the performance of his military duties and ultimately disrupted his marriage.

After completing the testing, appellant returned to his regular duties and continued his career in the Army for eleven years. He retired honorably as a Sergeant First Class in 1969. In 1975, when he received a letter from the Department of the Army, Walter Reed Medical Center, soliciting his participation in a follow-up study of volunteers who participated in the 1958 experiments at Edgewood Arsenal, appellant learned for the first time that he had been given LSD during the course of the 1958 experimentation.

Appellant filed claims with the United States Army and the Central Intelligence Agency [4] which were denied.[5] Thereafter, Stanley filed this suit in the district court for the Southern District of Florida.

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[4] The CIA found that its records disclosed no evidence that they had participated in the experiments. The Army office of the Judge Advocate General also found nothing in their records which indicated CIA involvement.

[5] On November 16, 1977, Stanley received a letter from the U.S. Army Claims Service informing him that his claims under the FTCA were not payable since "injuries to individuals incurred while on duty with the United States Army are considered to be incident to the individual's service, *Feres v. United States.*" The letter further advised him that he could file suit in the appropriate United States District Court if he was dissatisfied with the action taken on his claim.

II. APPLICABILITY OF FERES

In *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court considered the claims of three servicemen for recovery under the Federal Tort Claims Act for injuries sustained while they were on active duty. The Court was persuaded to dismiss the suits by consideration of factors such as the "peculiar and special relationship of the soldier to his superior, the effect of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." *United States v. Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 143, 99 L.Ed. 139 (1954).[6] The Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159.

Although the *Feres* doctrine has been questioned at times,[7] its viability was recently reaffirmed by the

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[6] Other factors considered by the Court in *Feres* include the notion that Congress could not have intended to include military personnel within the FTCA coverage, given the statutory compensation system for members of the armed service; the fact that plaintiffs could not point to any liability of a private individual analogous to that which they were asserting against the United States; and the concern that application of local tort law under the FTCA would interfere with the uniform conduct of military activities by imposing standards of care that varied from state to state.

[7] *See* discussion in *Parker v. United States*, 611 F.2d 1007, 1010-11 (5th Cir. 1980); Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery? 77 Mich. L. Rev. 1099 (1979).

Supreme Court. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed. 2d 66 (1976). Therefore, if Stanley was engaged in activities incident to his military service at the time his injuries arose, the district court was correct in holding the United States immune to Stanley's suit under the Federal Tort Claims Act.

Appellant argues that his participation in the chemical warfare testing program should not be considered "activity incident to service" because he was a volunteer and had been given a release from his regular duties in order to participate in the program. Additionally, appellant contends that the Government's activity here was illegal and thus should not be covered by the *Feres* doctrine.

Appellant has no sound authority for his assertion that the voluntary status of his participation in the program necessitates the conclusion that *Feres* should not control. *Feres* has been applied in cases involving a wide range of voluntary activity. *See, e.g., Charland v. United States*, 615 F.2d 508 (5th Cir. 1980) (servicemen killed while voluntarily participating in a Navy Seal Training exercise); *Uptegrove v. United States*, 600 F.2d 1248 (9th Cir. 1979) (serviceman killed while voluntarily traveling as a military space available passenger); *Mason v. United States*, 568 F.2d 1135 (5th Cir. 1978) (per curiam) (motor vehicle accident on base while serviceman tending to personal business); *Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975) (serviceman injured while riding horse rented from stable owned and operated by Marine Corps); *Chambers v. United States*, 357 F.2d 224 (8th Cir. 1966) (serviceman injured in swimming pool at an Air Force base); *Schnurman v. United States*, 490 F.Supp. 429 (E.D.Va.1980) (serv-

iceman injured while participating voluntarily in Naval experiment designed to test the effectiveness of certain protective clothing when exposed to sulphur mustard gas); *Schmid v. Rumsfield*, 481 F.Supp. 19, 21 (N.D.Cal.1979) (serviceman assaulted as result of his voluntary activities as informant assisting in the recovery of stolen government property and prosecution of drug offenses); *Loeh v. United States*, No. 77-2065-B and 77-2023-B (S.D.Ill. April 23, 1979) (serviceman injured when administered LSD while participating voluntarily in Army drug experimentation program).

Additionally, courts have consistently applied *Feres* in suits to recover for the alleged medical malpractice of Army physicians and surgeons where the claimant's activity when injured was essentially voluntary in nature. *See, e.g., Veillette v. United States*, 615 F.2d 505 (9th Cir. 1980); *Vallance v. United States*, 574 F.2d 1282 (5th Cir.) (per curiam), *cert. denied*, 439 U.S. 965, 99 S.Ct. 453, 58 L.Ed.2d 423 (1978); *Peluso v. United States*, 474 F.2d 605 (3d Cir.) (per curiam), *cert. denied*, 414 U.S. 879 94 S.Ct. 50, 38 L.Ed.2d 124 (1973); *Hall v. United States*, 451 F.2d 353 (1st Cir. 1971); *Howell v. United States, et al.*, 489 F.Supp. 147 (W.D.Tenn.1980). *Feres* has even been applied in cases involving elective surgery. *Harten v. Coons*, 502 F.2d 1363 (10th Cir.), *cert. denied*, 420 U.S. 963, 95 S.Ct. 1354, 43 L.Ed.2d 441 (1974); *Lowe v. United States*, 440 F.2d (5th Cir.), *cert. denied*, 404 U.S. 833, 92 S.Ct. 83, 30 L.Ed.2d 64 (1971). Moreover, the servicemen in the three cases before the Supreme Court in *Feres* itself were all engaged in essentially voluntary activity at the time they were injured. Therefore, appellant's contention that the voluntary nature of his participation in the

program should take him outside the bounds of *Feres* is without merit.

Likewise, the fact that appellant had been given a release from his regular duties does not preclude the possibility that appellant was injured while engaging in "activity incident to service." In a factual setting virtually identical to the one at hand, the Second Circuit found that the serviceman was on active duty at the time the experimentation took place despite the fact that the plaintiff was on a "Temporary Duty Assignment" when he was administered LSD. *See Lerner v. United States, et al.*, No. 76 Civ. 4349 (S.D.N.Y. Jan. 16, 1978), *aff'd mem*, 578 F.2d 1368 (2d Cir., 1978). Similarly, in *Mason v. United States, supra*, this Court was not persuaded by the argument that *Feres* should not apply when a serviceman was injured during the time in which he had been given a release from his routine duties. The court reasoned that the serviceman was still subject to all military regulations and was available for emergency service or temporary duties and held the government immune to suit. 568 F.2d at 1136. *See also Stansberry v. Middendorf*, 567 F.2d 617 (4th Cir. 1978) (per curiam); *Thomason v. Sanchez*, 398 F.Supp. 500 (D.N.J. 1975), *aff'd*, 539 F.2d 955 (3d Cir. 1976) (*Feres* applied where serviceman injured while riding motorcycle on base during "off-duty" hours); *Watkins v. United States*, 462 F.Supp. 980 (S.D. Ga. 1977) (serviceman injured on base during "off duty" hours).

Appellant relies upon several cases in which military plaintiffs were allowed to recover despite the government's argument that *Feres* should apply. Those cases, however, all involved situations which are distinguishable from the situations at hand. For

example, in *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954), the Supreme Court allowed a veteran to pursue his claim under the FTCA since he had actually been discharged at the time he was injured. *See also Bankston v. United States*, 480 F.2d 495 (5th Cir. 1973). In contrast, Stanley does not claim to have been discharged at the time he participated in the experiments. Stanley also fails to allege that he was on furlough or on a pass as were the plaintiffs in *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949) and *Knecht v. United States*, 144 F.Supp. 786 (E.D.Pa. 1956), *aff'd* 242 F.2d 929 (3d Cir. 1957). Finally Stanley was not tending to his personal affairs as he saw fit at the time of the accident as were the plaintiffs in *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980) and *Hand v. United States*, 260 F.Supp. 38 (M.D. Ga. 1966). *See also Downes v. United States*, 249 F.Supp. 626 (E.D.N.C. 1965).[8]

The fact that the injury occurred on a military base is strong evidence that the plaintiff was engaged in activity incident to service at the time, although this fact alone is not dispositive. *See Hand v. United States, supra; Downes v. United States, supra.* The Court must consider the totality of the circumstances surrounding the injury and distinguish between "those cases involving activities arising from life on the military reservation and those in which the presence on the base has little to do with the soldier's military service." *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980).

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[8] Moreover, the fact that a serviceman was tending to personal affairs at the time of his injury has not always led a court to find the situation outside the bounds of *Feres*. *See, e.g., Mason v. United States*, 568 F.2d 1135 (5th Cir. 1978); *Zoula v. United States*, 217 F.2d 81 (5th Cir. 1954).

In the *Parker* case, this Court held that a serviceman's claim under the Federal Tort Claims Act was not foreclosed even though the injury occurred on a military base where the function the plaintiff was performing at the time of his death was not related to his military status and did not arise from his life on the base. The court allowed Parker to maintain his suit under the Act since he was on a four day pass and merely driving through the base while tending to the purely personal business of moving his family to a new home at the time the accident occurred.[9]

In contrast, Stanley was not on a pass and was not tending to purely personal business at the time this alleged injury arose. At the time Stanley was given LSD, he was a Master Sergeant in the Army who had volunteered to participate in an experimental program in lieu of his regular duties. The experiment was conducted on an Army base by and for the benefit of the Army. Thus, the relationship between Stanley and the allegedly negligent individuals stemmed from their official military relationship. *See Lee v. United States*, 261 F.Supp. 252, 256 (C.D.Cal. 1966), *rev'd* 400 F.2d 558 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969). *See also, Camassar v. United States*, 400 F.Supp. 894 (D.Conn. 1978), *aff'd per curiam*, 531 F.2d 1149 (2d Cir. 1976). Stanley had been informed that he was free to leave the testing program at any time; however, this freedom appears to have been restricted to his returning to his original post at Fort Knox. He did return to his original duties there after he was

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[9] The *Parker* court indicated that *Feres* might have applied had Parker been attending to personal affairs arising from life on the base, such as participating in recreational activities or shopping.

released from Edgewood and remained in the service for eleven years. At least, therefore, he was subject to ultimate military control throughout the duration of his participation in the program. *See Mills v. Tucker*, 499 F.2d 866 (9th Cir. 1974) (per curiam); *cf. Hall v. United States*, 451 F.2d 353 (1st Cir. 1971) (rejecting contention that *Feres* applies only where military discipline is involved.) Stanley was receiving military pay and was promised a letter of commendation for his participation in the program. Clearly his participation in the program was activity incident to his military service despite the fact that he had been given a release from his regular duties. *See Garrett v. United States*, 625 F.2d 712 (5th Cir. 1980); *Shults v. United States*, 421 F.2d 170 (5th Cir. 1969) (per curiam).

The trial court also correctly disposed of appellant's contention that the testing program was so "patently illegal" that it could not be considered activity incident to service. The cases cited by appellant in support of this contention are inapposite as they do not involve tort claims by servicemen or address the applicability of the *Feres* doctrine. *See Birnbaum v. United States*, 436 F.Supp. 967 (E.D.N.Y. 1977); *Avery v. United States*, 434 F.Supp. 937 (D.Conn. 1977); *Cruikshank v. United States*, 431 F.Supp. 1355 (D.Hawaii 1977). Moreover, the argument that a drug testing program such as the one involved in this case should be considered outside the scope of the *Feres* doctrine since the program was not the kind of activity which might reasonably be anticipated as ancillary to military service has been rejected in two other cases involving facts virtually identical to those before this Court. *Lerner v. United States, supra; Loeh v. United States, supra; Nagy v. United States,*

471 F.Supp. 383 (D.D.C. 1979). *See also Southard v. United States*, 397 F.Supp. 409 (E.D. Pa. 1975) (*Feres* applied despite allegation of illegal conduct by the Army).

The *Feres* doctrine has been applied broadly over the years. Although the action before the Court in *Feres* was against the United States, the doctrine has been extended to apply to suits against individual defendants. *See, e.g., Bailey v. DeQuevedo*, 375 F.2d 72 (3d Cir. 1967); *Bailey v. Van Buskirk*, 345 F.2d 298 (9th Cir. 1965), *cert. denied*, 383 U.S. 948, 86 S.Ct. 1205, 16 L.Ed.2d 210 (1966). Likewise, although the *Feres* case involved allegations of negligence, the doctrine has been extended to hold the United States immune to suits based on intentional or reckless as well as constitutional torts. *See, e.g., Jaffe v. United States*, 468 F.Supp. 632, 635 (D.N.J. 1979), *aff'd*, 592 F.2d 712 (3d Cir. 1979), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066; *Citizen National Bank of Waukegan v. United States*, 594 F.2d 1154 (7th Cir. 1978); *Calhoun v. United States*, 475 F.Supp. 1 (S.D.Cal. 1977), *aff'd*, 604 F.2d 647 (9th Cir. 1979), *cert. denied*, 444 U.S. 1077, 100 S.Ct. 1079, 62 L.Ed.2d 761 (1980); *Misko v. United States*, 453 F.Supp. 513 (D.D.C. 1978); *aff'd* 593 F.2d 1371 (D.C. Cir. 1978); *Rotko v. Abrams*, 338 F.Supp. 46 (D.Conn. 1971), *aff'd*, 455 F.2d 992 (2d Cir. 1972); *Everett v. United States*, 492 F.Supp. 318, 322 (S.D. Ohio E.D., 1980); *Schnurman v. United States, supra*; *Sigler v. LeVan*, 485 F.Supp. 185, 191 (D.Md. 1980); *Schmid v. Rumsfeld*, 481 F.Supp. 19, 21 (N.D.Cal. 1979); *Nagy v. United States, supra; Thornwell v. United States*, 471 F.Supp. 344, 348 (D.D.C. 1979); *Lange v. Black*, No. 78-518-E (S.D. Cal. Jan. 3, 1979). *But see Jaffee v. United States*,

No. 79-1543 (3d Cir. Feb. 20, 1980) (petition for rehearing en banc granted, April 11, 1980); *James v. United States*, 358 F.Supp. 1381 (D.R.I. 1973). These extensions of the *Feres* doctrine have been premised in the notion that the same policies underlying the *Feres* doctrine are involved regardless of whether the suit is against the United States or the specific individual responsible and whether or not the legal theory of a complaint is negligence. Despite the apparent harshness of the application of *Feres* to the facts before us, we are compelled to conclude that the trial court correctly applied *Feres* and held the United States immune to Stanley's suit under the Federal Tort Claims Act for injuries allegedly sustained due to negligence in the administration of the drug testing program at Edgewood Arsenal.

III. SEPARATE TORT THEORY

As an additional point on appeal, appellant contends that even if *Feres* precludes his recovery of damages based on the original experiments, he has properly alleged a separate cause of action for damages due to the negligent failure of the Army officers involved to monitor his condition after his discharge which would not be barred by *Feres*. For this contention, he relies principally on a case involving similar facts, *Thornwell v. United States*, *supra*, where the court allowed recovery damages resulting from the government's failure to provide a veteran with follow-up treatment after his discharge. 471 F.Supp. at 349-53.[10]

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[10] The *Thornwell* court found that the plaintiff there could recover both for acts of negligence and violations of his Fifth Amendment rights which occurred after his discharge.

Appellees argue that appellant's reliance upon the *Thornwell* case constitutes a new theory which appellant should not be entitled to raise for the first time in a reply brief to this appellate court. *See Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976); *Capps v. Humble Oil and Refining Co.*, 536 F.2d 80 (5th Cir. 1976); *Stanley Educational Methods, Inc. v. Becker C.P.A. Review Course, Inc.*, 539 F.2d 393 (5th Cir. 1976). We need not decide the correctness of appellee's argument on this point because we find that, in any case, Stanley has failed to allege facts which bring his case within the separate tort theory of the *Thornwell* case.

In *Thornwell*, the district court considered claims of a serviceman who had been surreptitiously drugged with LSD and then subjected to intense interrogation after he had been imprisoned as part of an Army investigation into the theft of a large number of classified documents. During his imprisonment, Thornwell had been subjected to several different, harsh interrogation techniques; the use of LSD was part of the investigation as well as part of an Army program to test the utility of LSD as an aid to interrogation. The court applied the *Feres* doctrine and dismissed those of Thornwell's claims which were based on injuries sustained due to the administration of LSD to him while he was in the service; however, the court found that *Feres* did not preclude Thornwell from pursuing claims based on injuries due to conduct occurring after his discharge. The court concluded that *Feres* should not apply to the post-discharge claims because Thornwell had been injured by two entirely separate torts—an intentional act while he was on active duty and a subsequent negligent act which "occurred, *in its entirety*, after he

attained civilian status." 471 F.Supp. at 351 (emphasis in original). The court found that this result was compelled by *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954), where the Court ruled that *Feres* should not prevent a veteran from recovering for service-related injuries which were aggravated by an operation performed negligently six years after his discharge from the service. Additionally, the court found that Thornwell's situation was analogous to that of the plaintiff in *Schwartz v. United States*, 230 F.Supp. 536 (E.D. Pa. 1964). There the court allowed recovery for injuries resulting from the negligent failure of the government to provide proper follow-up care to a veteran who had been treated with a radioactive contrast dye, umbrathor, when he had experienced sinus trouble while he was an enlisted man in the Navy. *See also Hungerford v. United States*, 192 F.Supp. 581 (N.D. Cal. 1961), *rev'd on other grounds*, 307 F.2d 99 (9th Cir. 1962).

Initially, we find that Stanley has failed to allege an intentional tort committed while he was in the service. Although there is some language in the *Thornwell* case which would indicate that a negligent act will in some circumstances suffice as the original tort,[11] at least one court following *Thornwell* emphasized the fact that the plaintiff there, like the plaintiff in *Thornwell*, had undergone a wilfully inflicted tort while on active duty. *Everett v. United States*, *supra* at 326 n.6. *See also Schnurman v. United States*, *supra* at 429. Thus the clearest way to fall within the theory of *Thornwell* would be to allege an intentional or wilful tort injuring an active duty serviceman and a negligent or intentional fail-

[11] *See* 471 F.Supp. at 352.

ure to provide proper follow-up care which begins after the plaintiff's discharge from the service.

Even if Stanley's allegations of negligence suffice as the original tort, however, he has failed to allege a separate negligent act occurring "entirely after discharge." The plaintiff in *Schwartz v. United States*, *supra*, unlike the plaintiff here, based no claim on negligence occurring during the time he was in the service. His sole contention was that he had been injured by a series of negligently performed medical tests during the twelve year period after his discharge, which resulted in his injuries. There was no such active negligence alleged to have occurred after Stanley's discharge. Stanley has alleged merely an act of negligence which occurred while he was on active duty, the effects of which remained uncorrected after discharge. *See Nagy, supra.*

Moreover, even if the *Thornwell* court is correct in its conclusion that a mere failure to provide information is a separate actionable tort, we are not persuaded that the negligent failure to warn in Stanley's case occurred "entirely after his discharge." Thornwell received a general discharge just four months after he was given LSD. Thus, the government's failure to monitor his condition took place entirely after his discharge. Stanley, on the other hand, remained in the service for eleven years after the administration of the drug. Even if the government was negligent in failing to monitor his condition and provide him with any treatment, this negligent failure to monitor him cannot be seen as having taken place "entirely after his discharge." Stanley has at best alleged two negligent acts, the administration of the LSD and the negligent failure to monitor his condition, both of which occurred at least in part during his time as a serviceman even if they or their effects

lingered after his discharge. Allegations of such "continuing torts" do not escape the application of the *Feres* doctrine.

In the *Feres* case, one of the claimants alleged that a towel had been left in his stomach during an operation while he was in the service. The towel was discovered during an operation taking place after his discharge yet the court dismissed the complaint since the original injury had occurred while he was in the service. In several other analogous cases, the courts characterized the situations as simple acts of negligence which remained uncorrected after discharge and denied recovery despite allegations of a failure to provide follow-up care. *See Henning v. United States*, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016, 92 S.Ct. 676, 30 L.Ed.2d 664 (1972) (failure to inform veteran of true content of X-rays which had been taken while he was on active duty); *Schnurman v. United States*, *supra*, (failure to provide veteran with follow-up care and supervision for injuries resulting from his exposure to mustard gas while he was a serviceman participating in an experiment to test protective clothing); *Wisniewski v. United States*, 416 F.Supp. 599 (E.D. Wis. 1976) (veteran's claim based on a failure to provide him either before or after his discharge with results of a blood test taken while he was in the service). Morover, in the *Thornwell* case itself the court stated:

> Whatever the broader complications of [*Henning* and *Wisniewski*], it is clear at the very least that a mere act of negligence which takes place while the plaintiff is on active duty and which then remains uncorrected after discharge is not grounds for suit.

471 F.Supp. at 351. We find that Stanley likewise has failed to allege a negligent act occurring entirely

after his discharge necessary to fall within the separate tort theory of *Thornwell.*

In reaching this conclusion we are persuaded by the reasoning of the court in *Schnurman v. United States, supra.* In that case a serviceman who had volunteered in 1944 to participate in an experiment designed to test the effectiveness of protective clothing against exposure to sulphur mustard gas was injured when his gas mask malfunctioned. Two years later he was discharged from the service. For thirteen years after his discharge he sought medical help for chest pains, respiratory problems and other ailments but never mentioned the possibility that those injuries were the result of mustard gas exposure. In 1976 the claimant notified a doctor that he had once been exposed to sulphur mustard gas and the doctor concluded that the plaintiff's medical problems resulted from this exposure. The plaintiff then filed suit, alleging that he had been injured by the government's negligent failure to provide him after his discharge with follow-up examinations, treatment, supervision or to warn him of the risk of physical injury presented by his exposure to mustard gas The court found that: "The Department of the Navy could well have been more attentive to plaintiff's immediate reactions to the mustard exposure and perhaps should have ensured that the subjects were fully informed of the true nature of the experiment once the need for secrecy had passed." 490 F.Supp. at 437. Nevertheless, the court rejected plaintiff's argument based on *Thornwell.* In so doing the court stated:

> Without commenting on the compatibility of [the holdings in *United States v. Brown, Schwartz v. United States* and *Thornwell*] with

the *Feres* doctrine, the Court concludes that application of this continuing or separate tort theory to plaintiff's case would be inconsistent both with the instant facts and with the language and rationale of *Feres*. Plaintiff's brain, cardiovascular, hearing, respiratory, and eyesight difficulties for which he seeks compensation were not shown to be caused in any way by the government's failure to treat plaintiff after discharge or to warn him of the true nature of the gas to which he had been exposed. There was no testimony that his injuries were in any way aggravated or multiplied by this alleged negligence on the part of the government, nor was it shown that follow-up treatment could have avoided any long-term effects of the exposure, as was the case in *United States v. Brown, supra.* Indeed, simply stated, there was no evidence to support a conclusion that there was any causal connection between the plaintiff's present condition and the government's alleged failure in regard to the issue now addressed. The *Feres* doctrine, in the Court's view, is one of broad application. Disallowing recovery for an in-service tort under *Feres*, but allowing recovery for a failure to monitor and treat injuries resulting from that same tort would leave very little of *Feres* immunity, especially in cases where injuries do not manifest themselves until after a serviceman's discharge. *See Broudy v. United States*, Civ. No. 79-02626LEW(GX) (C.D.Cal., Jan. 2, 1980).

Id. Similarly, we conclude that the facts and rationale of the *Feres* doctrine demand its application in this case.

IV. GRANTING OF SUMMARY JUDGMENT

Appellant contends that even if the trial court was correct in finding that *Feres* applied to the facts of this case, the court erred in disposing of the case by way of summary judgment rather than dismissal for lack of subject matter jurisdiction. This contention is based on the notion that if *Feres* applies, a district court lacks subject matter jurisdiction because the *Feres* doctrine is a judicially created exception to the waiver of sovereign immunity contained in the Federal Tort Claims Act and when the government has not consented to suit, the court has no subject matter jurisdiction to hear the claim. Appellant argues that once a court has determined that *Feres* applies, the court lacks subject matter jurisdiction, and, therefore, has no power to render a judgment on the merits of the case. Thus, he contends that the trial court in this case had no power to grant summary judgment, which acts as a final adjudication on the merits, but should have dismissed the case without prejudice. *See Dassinger v. South Central Bell Telephone Co.*, 505 F.2d 672 (5th Cir. 1974); *State of Oregon v. United States*, 195 F.Supp. 276 (D.Ore. 1961), *aff'd* 308 F.2d 568 (9th Cir. 1962), *cert. denied*, 372 U.S. 941, 83 S.Ct. 934, 9 L.Ed.2d 967 (1963); *People v. United States*, 307 F.2d 941 (9th Cir. 1962). *See generally*, 6 *Moore's Federal Practice*, ¶ 56.03, ¶ 56.26.

Appellant points also to cases holding that summary judgment is an extreme remedy which is proper only if the claimant is not entitled to recovery under any circumstance. *See, e.g., Weber v. Towner County*, 565 F.2d 1001 (8th Cir. 1977); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405 (D.C.N.Y. 1973). He contends that he has a separate theory

of recovery based on the Constitution and 28 U.S.C. § 1331. *See Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).[12] Appellant, therefore, asks this Court to reverse the granting of summary judgment and to remand with directions that the claim be dismissed for lack of subject matter jurisdiction and that the plaintiff be allowed to amend "to correct a defective allegation of jurisdiction," 28 U.S.C. § 1653.

"The United States, as sovereign, is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1352, 63 L.Ed.2d 607 (1980), *quoting United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed.1058 (1941). *Accord, Enfinger v. Enfinger*, 452 F.Supp. 553 (M.D.Ga.1978). Where no such consent exists, a district court has no jurisdiction to entertain a suit against the United States. *Mitchell, supra*, 445 U.S. at 538, 100 S.Ct. 1352. *United States v. King*, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969); *United States v. Shaw*, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888 (1940); *Sprouse v. Federal*

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[12] At the time plaintiff filed his complaint in this case, the Fifth Circuit took a restrictive approach to causes of action under *Bivens*. *See Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978) (en banc); *Seibert v. Baptist*, 594 F.2d 423 (5th Cir. 1979). However, subsequent to the trial court's granting of summary judgment in this case, the Fifth Circuit's decision in *Davis* was reversed by the Supreme Court. *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). This Court has applied *Davis* retroactively, *Seibert v. Baptist*, 599 F.2d 743 (5th Cir. 1979).

Prison Industries, Inc., 480 F.2d 1, 3 (5th Cir. 1973).

The Federal Tort Claims Act is a waiver of the federal government's immunity for the torts of its employees under certain circumstances. The Act provides that the United States shall be liable for "injury or . . . death caused by the negligent or wrongful act or omission of any employer [sic] of the Government . . . under circumstances where the United States, if a private person, would be liable to the claimant. . . ." 28 U.S.C. § 1346(b). This waiver has been construed broadly. *See United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S.Ct. 63, 95 L.Ed. 595 (1951). However, this consent to suit is not without exceptions. The Act itself excludes certain types of government action from judicial review. 28 U.S.C. 2680. More importantly, in *Feres v. United States*, the Supreme Court held that the Act did not waive immunity for claims brought by servicemen for injuries sustained while on active duty. *Dalehite v. United States*, 346 U.S. 15, 31, n.25, 73 S.Ct. 956, 965, 97 L.Ed. 1427 n.25 (1953). Courts have uniformly held that where conduct complained of falls within one of the statutory exceptions to the FTCA, the district court is without jurisdiction of the subject matter thereof. *See, e.g., First National Bank v. United States*, 552 F.2d 370, 374 (10th Cir. 1977), *cert. denied*, 434 U.S. 835. 98 S.Ct. 122, 54 L.Ed.2d 96 (1977); *Smith v. United States*, 546 F.2d 872, 876 (10th Cir. 1976); *Gibson v. United States*, 457 F.2d 1391, 1392 n.1 (3d Cir. 1972); *Konecny v. United States*, 388 F.2d 59 (8th Cir. 1967); *Sanchez Tapia v. United States*, 338 F.2d 416 (2d Cir. 1964); *Summers v. United States*, 480 F.Supp. 347, 349 (D.Md.1979). We conclude that

when a case under the Tort Claims Act falls within the bounds of *Feres*, a judicially created exception to the Act, the Court likewise has no jurisdiction to hear the case.

A federal district court is under a mandatory duty to dismiss a suit over which it has no jurisdiction. *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 671-72 (5th Cir. 1978); *Rodriquez v. Ritchey*, 556 F.2d 1185, 1192 n.30 (5th Cir. 1977) (en banc); *Scott v. Abilene Independent School District*, 438 F.Supp. 594, 598 (N.D.Ga.1977). When a court must dismiss a case for lack of jurisdiction, the court should not adjudicate the merits of the claim. *Durham v. Mason and Dixon Lines, Inc.*, 404 F.2d 864 (6th Cir. 1968); *Guthrie v. Dow Chemical Co.*, 445 F.Supp. 311, 315 (S.D.Tex.1978). Since the granting of summary judgment is a disposition on the merits of the case, a motion for summary judgment is not the appropriate procedure for raising the defense of lack of subject matter jurisdiction. *Studio Electrical Technicians, Local 728 v. International Photographers of the Motion Picture Industries, Local 659*, 598 F.2d 551, 552, n.2 (9th Cir. 1979); *O'Donnell v. Wien Air Alaska, Inc.*, 551 F.2d 1141, 1144-45 n.3 & 4 (9th Cir. 1977); *Solomon v. Solomon*, 516 F.2d 1018 (3d Cir. 1975); *Kowalezwk v. Walsh*, 482 F.Supp. 959, 962 (D.Mass.1979); *Titsch Printing, Inc. v. Hastings*, 456 F.Supp. 445 (D.Colo. 1978); *Parker Drilling Company v. Metlakatla Indian Community*, 451 F.Supp. 1127, 1130 n.1 (D. Alaska 1978). *See also, Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 512 (5th Cir. 1980). *See generally*, 10 *Wright & Miller, Federal Practice and Procedure*, § 2713, p. 402 *et seq.* Therefore, since a defense based on the *Feres* doctrine is premised on

the notion that there is no jurisdiction to hear the claim as the United States has not waived sovereign immunity for that kind of suit, such defenses should be raised by a motion to dismiss for lack of subject matter jurisdiction rather than by a motion for summary judgment. *See Donham v. United States*, 395 F.Supp. 52, 53 (E.D.Mo.E.D.1975), *aff'd*, 536 F.2d 765 (8th Cir. 1976), *aff'd sub nom., Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1976); 6 *Moore's Federal Practice*, § 56.17[65] at 56-1091, ¶ 56.26[1] at 1513-14. *See also, Mitchell v. Riddell*, 402 F.2d 842 (9th Cir. 1968), *cert. denied*, 394 U.S. 456, 89 S.Ct. 1223, 22 L.Ed.2d 415 (1969); *Jorrie v. Imperial Investment Company*, 355 F.Supp. 1088 (W.D.Tex. 1973)). Accordingly, we conclude that the court below erred in granting summary judgment in favor of the United States and should have dismissed the case for lack of subject matter jurisdiction.

The government's arguments to the contrary are not persuasive. Appellees correctly state the rule [13] that a district court must treat a 12(b)(6) motion for failure to state a claim as a motion for summary judgment where the trial court considers matters outside the pleadings. *See United Independent School*

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[13] Federal Rule Civil Procedure 12(b) provides in pertinent part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

District v. City of Laredo, 634 F.2d 1353 (5th Cir. 1980) (Unpublished); *Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc.*, 568 F.2d 1074, 1077 (5th Cir.), *cert. denied*, 439 U.S. 836, 99 S.Ct. 120, 58 L.Ed.2d 133 (1978). However, a 12(b)(1) motion for lack of jurisdiction over the subject matter is not so converted. *Mortensen v. First Federal Savings and Loan Association*, 549 F.2d 884, 891 (3d Cir. 1977); *Rosemound Sand and Gravel Company v. Lambert Sand and Gravel Company*, 469 F.2d 416, 417 (5th Cir. 1972); *Riley v. Titus*, 190 F.2d 653, 655 n.1 (D.C. Cir. 1951); *Air Line Pilots Association v. Northwest Airlines, Inc.*, 444 F.Supp. 1138, 1142 (D.D.C.1978). *See also, Land v. Dollar*, 330 U.S. 731, 735 n.4, 67 S.Ct. 1009, 1010, 91 L.Ed. 1209 (1947). A dismissal for failure to state a claim is a disposition on the merits. *Kuhn v. National Association of Letter Carriers, Branch 5*, 570 F.2d 757, 760 n.5 (8th Cir. 1978). Since appellant's allegations should not have survived the 12(b)(1) jurisdictional attack based on *Feres*, the court had no jurisdiction to dispose of the case on the merits by reaching the 12(b)(6) motion of dismissal for failure to state a claim. *See Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 513 (5th Cir. 1980). Therefore, the fact that the trial court in this case considered matters outside the pleadings fails to render his action in treating the *Feres* issue on a motion for summary judgment proper. *See O'Donnell v. Wien Air Alaska, Inc., supra.*

The government also relies on several cases where the court affirmed the granting of summary judgment since subject matter jurisdiction was found lacking. *See, e.g., Sherwood Medical Industries v. Deknotel*, 512 F.2d 724 (8th Cir. 1975); *McDaniel*

v. Travelers Insurance Co., 494 F.2d 1189 (5th Cir. 1974) (per curiam). These cases, however, are not binding authority for the government's assertion that we should affirm the granting of summary judgment in this case. In the *Sherwood* case, the Eighth Circuit affirmed the granting of summary judgment because the court found there was no "actual controversy" as is required for a suit under the Declaratory Judgment Act. Summary judgment there was appropriate as the Declaratory Judgment Act does not of itself create jurisdiction so the court must have had another basis of jurisdiction in order to have reached the question of whether relief was available under the Declaratory Judgment Act. *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980); *Wells v. United States*, 280 F.2d 275 (9th Cir. 1970). The *McDaniel* case was a suit brought within the admiralty jurisdiction of this Court. There, we affirmed per curiam the granting of summary judgment because the plaintiff had failed in his attempt to allege that a maritime contract existed or that defendants had breached it. The question of whether the trial court should have dismissed the case for lack of jurisdiction rather than granting summary judgment was not raised.

There are cases where courts have disposed of the *Feres* issue by way of summary judgment. *See, e.g., Mason v. United States*, 568 F.2d 1135 (5th Cir. 1978) (per curiam); *Avila v. United States*, No. EP-80-LA-22 (W.D.Tex., July 24, 1980); *Butterline v. United States*, No. 77-3034 (E.D.Pa. January 8, 1980). However, we have found no case which addresses the precise issue before this Court, or provides any reasoned explanation for why summary judgment can be an appropriate disposition of a case

in which *Feres* applies.[14] There are numerous cases where the courts have granted motions to dismiss based on the *Feres* doctrine. *See, e.g., Charland v. United States, supra; Daly v. United States,* No. 76-2381-A (N.D.Mass.1980); *Sigler v. LeVan,* 485 F.Supp. 187 (D.Md.1980). *Lerner, supra; Nagy, supra; Thornwell, supra.* Moreover, in *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), the Supreme Court found that the district court had properly dismissed the plaintiff's FTCA claims for lack of subject matter jurisdiction because *Feres* applied.

The Supreme Court appears to consider the *Feres* doctrine to be an exception to the waiver of sovereign immunity contained in the FTCA. *See, id,* at 674, 97 S.Ct. at 2079 (Marshall, J., dissenting); *Dalehite v. United States, supra,* 396 U.S. at 31 n.25, 73 S.Ct. at 965 n.25. We conclude, therefore, that the only correct disposition of a case based on *Feres* is dismissal for lack of subject matter jurisdiction since the United States has not consented to the kinds of suits in which *Feres* applies.[15]

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[14] So far as appears, the parties in none of the cases cited by defendants raised this issue. Certainly, it was not reached in either of the per curiam opinions by this Court cited by defendant. *See Mason v. United States, supra; McDaniel v. Travelers Insurance Co., supra.*

[15] Possibly the confusion over this issue has been caused by language in *Feres.* There the court stated:

> Looking to the detail of the Act, it is true that it provides broadly, that the District Court, "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages. . . ." This confers jurisdiction to render judgment upon all such claims. But it does not say that all claims must be allowed. Jurisdic-

Finally, appellees argue that it would be improper for this court to remand this case with leave to amend since any amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962). They contend that *Feres* would bar even a constitutional claim which might be raised by appellants in this case. While we do not express any opinion on the merits of appellant's possible amended claims, we find that Stanley has at least a colorable constitutional claim based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 69 (1971). *See Jaffee v. United States*, No. 79-1543 (February 20, 1980) (petition for rehearing en banc granted, April 11, 1980); *James v. United States*, 358 F.Supp. 1381 (D.R.I.1973).

A court must dismiss a case over which it has no jurisdiction whenever the fatal defect appears. *Ken-*

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tion is necessary to deny a claim on its merits as a matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.

340 F.2d 141. The Supreme Court then dismissed the cases for failure to state a claim. However, subsequent cases have shown that the Supreme Court appears to consider the *Feres* doctrine as an exception to the FTCA's limited waiver of immunity. Perhaps the difficulty stems from the fact that before the Supreme Court handed down its decision in *Feres*, no exception to the Tort Claims Act for activities incident to service existed, and the court correctly had jurisdiction under the Act in the *Feres* case itself to decide the cases before them on a motion to dismiss for failure to state a claim. We do not find that this language in *Feres* requires us to affirm the granting of summary judgment in this case.

tucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 391 (5th Cir. 1977); *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 671-72 (5th Cir. 1978).[16] Leave to amend defective allegations of subject matter jurisdiction should be freely given. *Eklund v. Mora*, 410 F.2d 731 (5th Cir. 1969). See Fed.R.Civ.P. 15(a).

While we approve the determination of the trial court that the plaintiff could not prevail on his complaint, we reverse the order granting summary judgment and remand for the consideration of the trial court of any amendment which the appellant may offer, seeking to cure the jurisdictional defect.

VACATED and REMANDED.

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[16] *See also* Federal Rule Civil Procedure 12(h)(3) which provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

APPENDIX G

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

OFFICE OF THE CLERK
50 Spring Street SW.
Atlanta, Georgia 30303-3147

June 17, 1986

TO ALL PARTIES LISTED BELOW:

No. 84-5273

STANLEY vs. USA, et al.

D.C. Docket No. 78-8141-CIV-JAG

This is to advise that an order has this day been entered denying the petition( ) for rehearing.

—— The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

xx No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

MIGUEL J. CORTEZ
Clerk

By: /s/ Karen B. Sinyard
Deputy Clerk

cc: Mark W. Pennak
Barbara L. Herwig
James Mingle
Richard A. Kupfer

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(8) (7)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-393 and 86-443

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, et al.,
Petitioners,

vs.

JAMES B. STANLEY,
Respondent,

-and-

BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND, et al.,
Petitioners,

vs.

JAMES B. STANLEY,
Respondent.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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33 pp

QUESTIONS PRESENTED FOR REVIEW

In framing the questions presented for review, the United States and the other Federal Petitioners in Case No. 86-393 include matters which are in dispute. For example, it is in dispute whether Plaintiff was on "active duty" status while participating in an "official Army drug experimentation program," and it is in dispute that an appealable partial final judgment was ever entered in favor of the United States. It is also disputed that Plaintiff is suing his "superior officers." Concerning the question framed by the State Petitioners in Case No. 86-443, there is nothing in the record to substantiate that the "state civilian employees at all times acted under federal military direction and control." We therefore feel constrained to restate the questions presented as follows:

1. Whether the Court of Appeals erred in reopening the law of the case as established in a previous appeal, when controlling authority had changed during the interim.

2. Whether the Court of Appeals erred by finding this Court's decision in *Chappell v. Wallace*, and its rationale, to be distinguishable from the unique facts alleged in the present case.

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Nos. 86-393 and 86-443

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vs.

JAMES B. STANLEY,
Respondent.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, James B. Stanley, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's decision in this case. That opinion is reported at 786 F.2d 1490 and republished at (1a-20a).[1]

1. All references herein (eg. 1a-20a), are directed to the Appendix to the Petition for Certiorari filed by the United States of America, Case No. 86-393.

STATEMENT

There are some incorrect assertions in the statements of both Petitioners, as well as some statements outside the record. Also, some important facts which make this case more unique (and less "certworthy") have been omitted from the Petitioners' statements. We therefore supplement the statements as follows.

The Eleventh Circuit below mentioned some of the important facts in its opinion. (2a-3a). The district court judge elaborated further in his most recent opinion. (22a-23a).

The plaintiff did not volunteer to participate in any drug testing. He was not a true "volunteer," nor was he under any orders, nor was he taking advantage of a military privilege, nor was he on his regular duty status at the time in question.

While he was a master sergeant in the U.S. Army, Plaintiff volunteered to participate in a program ostensibly for the testing and development of various gas masks and protective clothing to be used as a defense against chemical warfare attack. There was no compulsion but he was promised that letters of commendation would be put in his file and he was released from his regular duty status for approximately a month. At any time Plaintiff desired he could withdraw from the program and return to his regular duties. There is no evidence as to his technical duty status during that month.

Plaintiff was deliberately given false information about the program in order to extract his consent to volunteer. The real purpose of the program was to observe Plaintiff's "unwitting reaction" to LSD, which was secretly introduced into his bloodstream on four occasions by being mixed

with his drinking water, while he carried out the charade of testing gas masks and clothing. Defendants intentionally withheld the true facts for the next eighteen years since it was an integral part of the program to have unwitting human subjects for experimental drug testing.

When Plaintiff unknowingly ingested this dangerous drug on four occasions in February 1958, he experienced severe reactions including hallucinations, but had no idea what was happening. Hallucinogenic drugs such as LSD were virtually unknown to the public in 1958. Eventually Plaintiff returned to his active duty at Fort Knox, Kentucky, but he continued to have recurrent episodes. He periodically lapsed into periods of incoherency, sometimes marked by violence, and he had no recall of such events afterwards. On one occasion he awoke from sleep late at night and, without reason, violently beat his wife and children later being unable to recall the event.

Plaintiff's inexplicable behavorial changes eventually resulted in the breakdown and dissolution of his marriage and family life. (22a-23a, n. 2). He was thereafter unable to perform his military duties efficiently and was reduced in rank for inefficiency. At times he would be absent without leave and could not recall his whereabouts when questioned. Before the drug testing he had an unblemished record; he had earned various military honors and intended to pursue a promising military career.

In 1969, Plaintiff retired from the army. He did not bring an FTCA action in 1975 as Petitioner (the United States) indicates. In December of 1975, he received a letter from the Department of the Army, Walter Reed Army Medical Center, which disclosed for the first time that he had been given LSD during February, 1958. The letter solicited his participation in a follow-up study of

the "volunteers" who participated in the 1958 LSD experiments. Plaintiff filed administrative claims with the United States Army, which were denied with the statement that there was no appropriation available to pay such a claim and that if Plaintiff was dissatisfied he should file an action in federal district court. (70a, n. 5). Plaintiff thereafter filed this action in the district court in May, 1978. (3a).

In the first appeal to the fifth circuit, the fifth circuit did not affirm an order dismissing the FTCA claims, as Petitioner states. Rather, the fifth circuit vacated a summary judgment on grounds that the district court had no subject matter jurisdiction to enter any judgment in favor of the government and, at most, it could only dismiss the FTCA claim, without prejudice, if the government was immune from suit. (67a-95a).

Next the Petitioner states that, after remand from the first appeal, the district court entered a partial final judgment in favor of the United States on November 9, 1982, which was never appealed. That is not exactly what happened. The district court entered an interlocutory "order" directing the clerk to enter a partial final judgment in favor of the United States (54a-55a), however the clerk never entered any final judgment on the civil docket. (See Appendix "A" to this brief). There was therefore no final judgment from which to appeal, as discussed in more detail *infra*.

Finally, the eleventh circuit below, in the second appeal, held that a case-by-case analysis is required under *Chappell*[2] to determine whether a particular *Bivens*[3] suit

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2. *Chappell v. Wallace*, 462 U.S. 296 (1983).

3. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

would undermine military discipline *if* the facts of the case appear to fall outside the typical *Feres*[4] factual paradigm. The government's Petition for Certiorari, at pages 6 and 11, omits the last half of this statement. (As the eleventh circuit also stated in *Cole v. United States,* 755 F.2d 873, 877, n. 11 (11th Cir. 1985), "We do not imply that such a case-by-case analysis is required in all cases.")

Also, in this regard, both the United States and the state defendants repeatedly assert in their Petitions that Plaintiff is suing his "superior officers" for constitutional violations, which is prohibited by the *Chappell* decision. We dispute that. We believe the evidence in this case, if we are allowed to present it, will indicate that the various different individual defendants, some of whom are civilian personnel, some are doctors, others are non-military federal executive officers, a university, and others yet to be discovered and named; have different degrees and types of involvement in the 1958 covert LSD drug experimentation program. Their relationship to each other and to the plaintiff is not yet developed by the record since this case is still at the pleading stage without an answer having yet been filed or any substantial discovery undertaken. (The eleventh circuit appeal was an interlocutory appeal.) Whether some or all of the defendants are "superior officers" in a disciplinary or military context within the contemplation of this Court's opinion in *Chappell* cannot yet be determined as it can on plenary appeal. There is also no record yet to develop how the LSD testing supposedly related to military service, which is pertinent to the *Feres* and *Chappell* analysis.

For this reason, this Court would be in a far better position to review these issues on a plenary appeal from

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4. *Feres v. United States,* 340 U.S. 135 (1950).

a final judgment after a full record has been developed, as discussed *infra*. In this same vein, both Petitioners also repeatedly state that all the individual defendants were acting under the control of the army and pursuant to military orders. The state defendants assert in their Petition that they had nothing to do with the development of this program, or the contract under which they acted, but they were merely ministerial characters controlled by the army, with no individual authority.

Suffice it to say, once again, that these assertions are completely outside the record. Certainly the federal defendants have never admitted that they completely controlled the state defendants and, because of the potential conflicts, the separate groups of defendants are being separately represented and are filing separate Petitions for Certiorari.

The state defendants assert (at page 17 of their Petition) that they "were admittedly minor figures in a federal military program." To our knowledge, nobody except the state defendants has admitted any such thing. There is no evidence yet whether they were civilian employees, independent contractors, or even joint venturers. There are not even any sworn allegations to this effect. The state defendants admit (at page 15 of their Petition) that we have had virtually no pre-trial discovery of their involvement, however they argue that we should not be able to discover anything about their contractual involvement because that would involve "inquiry into, and second guessing of military orders."

It is against this background that we respectfully urge this Court to conclude that the issues in this case are not "certworthy."

REASONS WHY THE PETITION SHOULD BE DENIED

I. General Certworthiness

The Petitioners assert generally that the issues in this case are of great practical importance to the armed forces and to civilian employees. That is only true if there are many other similarly situated plaintiffs who were fraudulently induced to become human subjects for LSD experiments. The government has never admitted that.

In truth, this case involves a very narrow holding based on a unique factual situation. The district judge (a nine year veteran on the fedral court and a state trial judge for fourteen years before that) stated: "This Court has seen few cases which more desparately cry out for and demand judicial redress." (51a). This case presents shades of an Orwellian novel where even one's own creative thought process is altered and controlled by the government. The district judge noted: "The acts alleged to have been committed by the officers and agents named as defendants in this case are insidious to the most fundamental rights protected by our Constitution: the right of an individual to control his mind, his private thoughts, and his bodily integrity." (51a). "The conduct alleged in this case would shock—if not outrage—the conscience of any court, and is most certainly protected against by the Constitution of the United States." (65a). Obviously, this is not a garden variety *Feres* or *Chappell* type case, and it is not likely to be a recurring fact pattern. We know of no other case that will turn on this one.

Perhaps even more importantly, the interlocutory nature of this case makes certiorari review by this Court

inappropriate. This Court has indicated on a number of occasions that it will not grant certiorari to review a nonfinal order except in extraordinary circumstances. Eg. *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893); *Cobbledick v. United States*, 309 U.S. 323, 324-325 (1940); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1915); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). Although the eleventh circuit below ultimately accepted review of the interlocutory order certified for appeal, one panel on the eleventh circuit initially declined to accept interlocutory review even at that level. (See Appendix "B" to this brief.) That says something about the certworthiness of this case at the Supreme Court level.

The federal defendants have also petitioned this Court to review the eleventh circuit's decision in *Johnson v. United States*, 749 F.2d 1530 (11th Cir. 1985), reinstated en banc, 779 F.2d 1492 (1986), which was cited by the eleventh circuit in the present case, and they argue that this Court should certainly accept certiorari in this case if it does so in *Johnson*. We disagree because, although we concur with the eleventh circuit's decision in *Johnson*, there are material differences between the two cases. In fact, the district judge who dismissed the *Johnson* case was the same judge who refused to dismiss this case.

First, *Johnson* has nothing to do with a *Bivens* action against individual federal officers.

Second, counsel representing *Johnson* before this Court have admitted there is a direct conflict on identical facts between circuit courts on the issue decided in *Johnson*. That is not the case here, however, since this case is factually distinguishable and this case raises serious ques-

tions about Plaintiff's active duty status, unlike *Johnson*. The injury in this case did not occur during the course of a military rescue operation as in *Johnson*, but rather, under circumstances far more attenuated from military service.

Third, the *Johnson* case went up to the eleventh circuit on a plenary appeal from a final order dismissing the case with prejudice, rather than on review of an interlocutory order as in this case.

Fourth, and perhaps most important, the *Johnson* case will govern all incidents of military air accidents in which FAA or other non-military personnel may arguably be negligent. Obviously that is a fact pattern capable of recurring time and again, which makes that case far more "certworthy" than this one. We do not believe (certainly we hope) the facts of *this* case would ever again occur in this country.

Fifth, the plaintiff in *Johnson* received a full range of Veterans' Benefits before bringing an FTCA action, however in this case such administrative benefits are not available. This case is entirely independent of *Johnson;* it is far narrower in application and less certworthy.

II. FTCA Claim

The government's main argument is that the eleventh circuit exceeded its jurisdiction by resurrecting the FTCA claim after the district court had entered an order pursuant to Rule 54 (b) for a partial final judgment, which (the government says) should have been appealed when it was entered. However, as stated above, no final judgment was entered by the clerk on the civil docket pursuant to the court's Rule 54 (b) order directing the clerk to enter

it, nor was any notice of entry of judgment mailed by the clerk to the parties pursuant to Rule 77 (d).

Under F.R.C.P. 54 (b), the district court may "direct the entry of a final judgment" as to fewer than all of the parties by making "an express direction for the en. of judgment" to the clerk. Here, the district court "ordered that the clerk enter final judgment in favor of the United States." (54a-55a). However, that "order" is not self executing and is not appealable. (From its own language, the order was obviously not intended to be self executing.)

F.R.A.P. 4 (a)(6) provides that a judgment is "entered," for appeal purposes, when it is entered in compliance with Rules 58 and 79 (a) of the F.R.C.P. Rules 58 and 79 (a) require the clerk to "enter" the judgment, as a separate document, on the civil docket, and provide that it shall only be effective when that has been accomplished. See also Form 32, appended to the F.R.C.P. The federal courts have repeatedly noted that until the clerk enters a separate judgment on the civil docket pursuant to Rules 58 and 79 (a), the appeal time does not begin to run. *United States v. Indrelunas*, 411 U.S. 216 (1973); *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978); *Ferrell v. Beatrice Pocahontas Co.*, 585 F.2d 683 (4th Cir. 1978); *Rappaport v. United States*, 557 F.2d 605 (7th Cir. 1977).

Even if the clerk had followed through and entered a final judgment on the civil docket, it still would not foreclose a later inquiry into the partial final judgment for several reasons. First, the district court had no subject matter jurisdiction to enter a partial final judgment for the United States on grounds of sovereign immunity; at most, all it could do was dismiss the action without prejudice for the reasons explained in *Stanley v. Central Intel-*

ligence Agency, 639 F.2d 1146 (5th Cir. 1981). Lack of subject matter jurisdiction can be raised at any time in the litigation and cannot be waived by any party's action or inaction. F.R.C.P. 12 (h); *Kain v. Winslow Mfg., Inc.*, 736 F.2d 606 (10th Cir. 1984); *Eagerton v. Valuations, Inc.*, 698 F.2d 1115 (11th Cir. 1983).

Second, we would have been hard pressed in 1982 to appeal the partial final judgment back to the fifth circuit since it was based on the fifth circuit's opinion in this case in 1981 in *Stanley v. C.I.A., supra*. It probably could have been changed to become a dismissal of the United States instead of a final judgment, but nothing substantive could possibly have been accomplished since the appellate court had just ruled on the Plaintiff's FTCA claim. The government would probably have characterized such an appeal as frivolous.

Third, even if there had been a final judgment entered which was not appealed, Plaintiff would now certainly have a viable motion for relief from that judgment under Rule 60 (b), for reasons number (4), (5) and (6) listed under that rule. The eleventh circuit's opinion in this case could be construed to simply support a Rule 60 motion for relief from judgment when the case returns to the district court on remand.

Apart from the procedural issue concerning the Rule 54 (b) order, the federal petitioners do not seem to challenge the eleventh circuit's discussion of how an appellate court that has once created the "law of the case" can reopen the issue in a later appeal when controlling authority has changed in the interim or manifest injustice would otherwise result. See also *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984); *Yamamoto v. Omiya*, 564 F.2d 1319 (9th Cir. 1977); *Lehrman v. Gulf Oil Co.*, 500 F.2d 659 (5th Cir. 1974).

The federal petitioners are incorrect in stating (at page 11) that there is no dispute Plaintiff's injuries were incurred incident to military service. Although the fifth circuit so held in the first appeal in this case (67a-95a), we disagreed then and we still dispute it. The fifth circuit focused on the Plaintiff's having "volunteered" for the program and cited a string of "volunteer" cases (72a-73a); but overlooked the fact that Plaintiff was not a true volunteer because his consent had been fraudulently extracted.

The fifth circuit also expressed reliance on the fact that the drug experiments occurred on a military base. (75a). Since that time, this Court has discounted the importance of that one fact. In *United States v. Shearer*, 473 U.S. ....., 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985) this Court noted that *Feres* seems best explained by the military discipline rationale, and that other rationales sometimes advanced in the past to support the *Feres* doctrine are "no longer controlling." *Shearer*, 105 S.Ct. 3043, n. 4. This Court stated, "the situs of the [incident] is not nearly as important as whether the suit requires the civilian court to second-guess military decisions." *Id.* at 105 S.Ct. 3043.

An activity should be deemed "incident to military service" only when the policy factors that support the doctrine are applicable to the facts. When the reason for the doctrine does not apply, the doctrine itself should not be applied. As this Court stated in *Shearer*, "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined. . ."

The Plaintiff here was not on his regular active duty status while at Edgewood Arsenal during the testing program. The eleventh circuit noted this in its opinion below. (12a). Plaintiff was released from his duty status

at Fort Knox, and while at Edgewood Arsenal, he had complete control over his movements (when he was not drugged). At any time, he could withdraw from the program and return to Fort Knox. There is no evidence as to any disciplinary relationship between Plaintiff and anyone else at the testing laboratories. There is no evidence as to his technical duty status during that month. There is also no record of how the LSD testing supposedly related to Plaintiff's military service.[5]

This case is unlike the cases relied on by the Petitioners. There is no questioning of direct military orders involved here (unlike the atomic testing cases), no threatened effect on performance of military duty or discipline, no facts involving the special nature of military life, the Plaintiff was not availing himself of one of the benefits of military service when the incident occurred (unlike the cases involving medical negligence by military doctors during the course of rendering free medical care to servicemen), nor is this case similar to the typical "volunteer" cases since Plaintiff never gave an informed consent to any drug experimentation.

Nor does this case require a civilian court to second-guess the wisdom of military decisions. The allegations here raise a case of patent illegality and violation of the Nuremberg Code, not just a question of the wisdom of military decision-making. Human experimentation of this nature has been condemned and declared illegal by every pertinent statute and regulation of the United States and by international standards. See *United States v. Karl Brant, et al.*, 2 Trials of War Criminals Before Nuremberg

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5. The mission of the army is to preserve peace and security, provide for the defense, support and implement national policies and objectives, and to overcome other aggressive nations. 10 U.S.C. §3062.

Military Tribunals, 181, 182 (1949). The Nuremberg Code has been adopted by the AMA and by the Chief of Staff and the Secretary of the Army, Navy and Air Force.[6]

A mechanical application of the *Feres* doctrine, in a case falling outside the rationale of *Feres,* would be inconsistent with the purpose of the Federal Tort Claims Act. If the *Feres* doctrine is to be applied regardless of whether the rationale applies, then American servicemen are reduced to a worse position than federal prisoners who may sue the government under the FTCA for negligence of prison officials. *United States v. Muniz,* 374 U.S. 150 (1963).

Additionally, even if the Plaintiff's activity at the testing laboratories is deemed incident to his miltary service, the reasoning of the eleventh circuit in *Johnson v. United States,* 749 F.2d 1530 (11th Cir. 1985), approved en banc 779 F.2d 1492 (1986), is sound and should be approved, if this Court reaches the merits in *Johnson.* It presents a balanced approach between the rationale behind the *Feres* doctrine and the public policy underlying the Federal Tort Claims Act. If the tortfeasor is not a member of the armed forces nor a civilian employee engaged in activities usually associated with the armed forces, *then* the Court should consider the rationale supporting the *Feres* doctrine to determine to what extent, if any, the allowance of the claim would circumvent the purpose of the doctrine. (LSD experimentation is not an activity usually associated with the armed forces.) If the prosecution of the claim would not compromise the military disciplinary structure nor otherwise encroach upon the

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6. There are supporting documents in the original record in this case described at R. 73-74, 140, 141-146, which were placed in a separate brown envelope—See R. 140.

rationale of the *Feres* doctrine, then there is no sound reason for barring the action.

III. Bivens Claim

Even if the *Feres* doctrine does apply here to preclude the FTCA claim against the United States, the eleventh circuit was correct in finding that it would not necessarily preclude the *Bivens* action against the responsible individual federal defendants. The eleventh circuit carefully distinguished this case from *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362 (1983), by noting how the "special factors" present in *Chappell* are not present in this case.

In *Chappell, supra*, the defendants were all clearly "superior officers" (unlike the present case) consisting of the commanding officer and other officers on a navy combat vessel, who were being sued by enlisted navy men aboard the vessel. The Plaintiffs in *Chappell* claimed that because of their minority race the officers on board failed to assign them to desirable duties and gave them low performance evaluations, thus impeding their advancement in the navy. There is a world of difference between those allegations, which clearly involve command decisions affecting the Plaintiffs, and the allegations in the present case. This Court's holding in *Chappell* was premised on the need for knee-jerk reflex obedience to orders from superior military officers, and the disruption *in that type of case* that might result "if the soldier were allowed to hale his superiors into court."

The Petitioners rely on this Court's seemingly broad statement in *Chappell;* "We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional viola-

tions." (103 S.Ct. at 2368). However, in context, this Court did not say it was creating a "per se" prohibition on all *Bivens* actions whenever the *Feres* doctrine would preclude an FTCA suit against the government. In fact, this Court noted it was dealing with a nonstatutory, constitutional remedy rather than Congress' intent behind the FTCA, and this Court stated; ". . . The Court's analysis in *Feres* 'guides' [not 'controls'] our analysis in this case." *Id.* at 2365. This Court specifically cautioned that its decision should not be read to mean that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. *Id.* at 2367.[7]

The federal petitioners argue that this Court should accept certiorari because the eleventh circuit's decision directly conflicts with the decisions of three other circuits in *Mollnow v. Carlton,* 716 F.2d 627 (9th Cir. 1983); *Gaspard v. United States,* 713 F.2d 1097 (5th Cir. 1983); and *Jaffee v. United States,* 663 F.2d 1226 (3d Cir. 1981). That is not the case. In fact, those cases were expressly distinguished by the district judge in this case. (32a-33a).

Although in *Mollnow,* the ninth circuit seems to interpret *Chappell* as imposing a per se prohibition against *Bivens* actions, one month later the same court (through a different panel) seemed to take a different view of *Chappell.* See *Gonzalez v. Dept. of the Army,* 718 F.2d 926, at

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7. Petitioners argue that the cases cited by this Court for this proposition in *Chappell* were not civil damage lawsuits, but habeas corpus or injunction cases, and therefore civil lawsuits for damages are still prohibited per se. Petitioners fail to explain how habeas corpus or injunction cases are any less disruptive or intrusive, or why they may not also involve second guessing military decision making. This is not a logical distinction. The nature of the relief sought is not nearly as important as the potential impact of the case on the military disciplinary structure, and that depends on the facts of the case.

929 (9th Cir. 1983). *Gaspard, supra,* and *Jaffee, supra,* are easily distinguishable. The Plaintiff here was not acting pursuant to direct orders, unlike the nuclear testing cases such as *Gaspard* and *Jaffee.* As the eleventh circuit below noted:

> Because he was surreptitiously administered the drug, Stanley could not possibly have challenged his 'orders' to drink the clear substance. 'The inescapable demands of military discipline and obedience to orders' are not implicated by the facts of this case. (12a).

The "direct conflict" asserted by the Petitioners, for which they ask this Court to accept certiorari, does not really exist.[8]

Contrary to the statement by the federal petitioners (at p. 16, n. 11), the federal courts are not unanimous in reading *Chappell* to be a per se prohibition of *Bivens* actions by military servicemen under all circumstances. In addition to the eleventh circuit in this case, the eighth circuit recently took the same flexible approach and expressly rejected the "per se prohibition" interpretation of *Chappell.*

In *Brown v. United States,* 739 F.2d 362 (8th Cir. 1984) the court applied this Court's language in *Chappell* and went on to analyze whether the rationale of the *Feres* doctrine would be fulfilled by applying it to the facts before the court. The court concluded that the case presented such a "unique factual situation" that the Plaintiff should be able to bring a *Bivens* action even though an

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8. The Court in *Gaspard* expressly stated that "it is crystal clear that *Bivens* claims are distinct from FTCA actions, and the *Feres* bar therefore does not automatically preclude the *Bivens* claim." 713 F.2d at 1102. See also *Gaspard, supra* at 1105, n. 17.

FTCA claim could not be prosecuted under the *Feres* doctrine. This Court denied certiorari in *Brown* (see 105 S.Ct. 3524) and should, for the same reasons, deny certiorari in this case which presents the same issue as *Brown*.

The present case involves facts even more unique than in *Brown, supra*. This case does not involve or threaten to compromise military discipline, nor the "special nature of military life." A case like this could easily involve a civilian, as much as a military serviceman.

A trial in this case would not involve second guessing of any military orders directed to this Plaintiff, since he was under no orders. The petitioners argue it could ultimately involve an inquiry into higher echelon military decision-making. However, if that was the standard for prohibiting a *Bivens* action in any case, no matter what kind of wrongful act may be perpetrated on a serviceman, the defendants could always remain immune by asserting their act was a result of "military decision-making."

The acceptance of the "per se immunity" rule argued for by petitioners under the type of facts in this case would be tantamount to admitting that because of Plaintiff's military status, federal officers can willfully and knowingly violate his constitutional rights without fear of accountability in the civil justice system. Would such a rule promote discipline in the military or encourage corruption? What would be the effect on morale and discipline if the judiciary countenanced (by ignoring) such patent illegality? To deny Plaintiff civil redress under these circumstances would do more to undermine military discipline than to permit recovery.

This Court has held that even a convicted and incarcerated federal prisoner may bring a *Bivens* action against

prison officials for violation of constitutional rights, under compelling circumstances. *Carlson v. Green*, 446 U.S. 14 (1980). Likewise for an FTCA action alleging negligence of prison officials. *United States v. Muniz*, *supra*. If the disciplinary structure within our prisons is not so overwhelming under all circumstances to preclude a civil lawsuit, should it be so in the military? By arguing for a "per se" prohibition against allowing a *Bivens* action in this case, the government is actually saying that an army master sergeant like Mr. Stanley should be relegated to a position inferior to that of a convicted and incarcerated federal prisoner. What kind of rational policy can justify such an anomalous result?

The federal petitioners also discuss, in general terms, the possibility of veterans benefits that may be available to Plaintiff. The petitioners have failed to specify at any time in this litigation what particular veterans benefits cover this type of claim and compensate for the type of injury that has been suffered here. The petitioners argue that there does not have to be "adequate" administrative compensation available, so long as Congress has shown some "activity in the field," which by itself creates a "special factor" that militates against allowing a *Bivens* action.[9] That is not an accurate statement of the current law.

Unless this Court intended in *Chappell*, *supra*, to silently modify the rule in *Carlson v. Green*, 446 U.S. 14 (1980), there must be a showing that Congress has provided an alternative remedy which it *explicitly* declared to be a substitute for recovery under the Constitution.

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9. The federal petitioners appear to concede at footnote 12, page 18 of their Petition for Certiorari, that the Veterans Benefits Act does not provide this Plaintiff with an adequate alternative remedy.

before this will automatically preclude a *Bivens* action. *Carlson, supra* at 446 U.S. 19-20. The alternative remedial scheme must be equally as effective as the damages action. *Id.* at 446 U.S. 18-19.[10] Mere "activity in the field" by Congress is just one factor that goes into the equation, but it is not by itself overriding. It was not "ignored" by the eleventh circuit below, as petitioners argue (at p. 18, n. 12). The eleventh circuit expressly considered it but concluded "that this factor also does not militate against permitting Stanley's Bivens claim." (12a).

The eleventh circuit, of course, did *not* hold that *Chappell* is limited only to cases involving the Code of Military Justice as an alternative compensation scheme. The argument of the federal petitioners to that effect (at page 18) is disingenuous. The eleventh circuit simply noted that the "intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* [the Board for the Correction of Naval Records and the Uniform Code of Military Justice] are clearly inadequate to compensate Stanley for the violations complained of here." (12a-13a).

The eleventh circuit was correct on this point. The administrative remedies which would have fully compensated the plaintiffs in *Chappell* for the type of wrong inflicted in that case (retroactive back pay and promotions, and correction of naval records) would be meaningless to Mr. Stanley in the present case. Such remedies cannot correct the constitutional wrong done to Mr.

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10. Veterans benefits are not equally effective as recovery under the Constitution since it neither makes the Plaintiff whole nor does it deter future abuses of power as does a *Bivens* action.

Stanley since, unlike *Chappell*, he is not just claiming the army cheated him out of money, or a promotion, or put unfair performance evaluations in his records. His claim is a tort claim and a constitutional claim, which has already been denied at the administrative level by the Army Claims Service. (70a, n. 5). Whatever Congress' "activity in the field" is supposed to be here, it has not helped Mr. Stanley very much.

IV. The State Petitioners

The main argument raised by the state petitioners in Case No. 86-443, concerning the civil rights statutes, 42 U.S.C. §§1983 and 1985, is actually a non-issue before this Court since neither of the lower courts addressed it. The eleventh circuit below expressly declined to address the civil rights claims because; "not only have those claims not been addressed by the district court, but they are also beyond the scope of the issue for which we certified this interlocutory appeal." (22a). There are motions to dismiss the civil rights claims that are still pending in the district court. (State Petition at p. 9, n. 2). The state petitioners admit (at p. 9) that the civil rights claims against them have not yet been addressed by the lower courts. Accordingly, that issue is not presented for review to this Court at this time.

In *Chappell*, although this Court addressed the *Bivens* action it expressly declined to address the civil rights action under 42 U.S.C. §1985 because it had not been addressed by the circuit court of appeals. *Chappell*, *supra* at 103 S.Ct. 2368, n. 3.

To the extent the state petitioners assert they were "civilian employees, agents of the military" (p. 11), we mentioned before there is no evidence of that. There is

no evidence yet whether they were civilian employees, independent contractors, or joint venturers.

The individual defendants (state and federal) are entitled, of course, to raise a *qualified* immunity defense if they acted in good faith (although that has not yet been pleaded). *Butz v. Economou*, 438 U.S. 478 (1978). Their arguments regarding the minor extent of their participation and their good faith are both outside the record and only relevant anyway to a qualified immunity defense.

The state petitioners argue that failing to grant them complete immunity in this case will inevitably result in state universities withholding their assistance and expertise from the military. That is no more true than the assertion that failing to grant governmental contractors who build military products a complete immunity from suit by injured servicemen will result in drying up the source of all such contracts. Some courts (including the eleventh circuit) have recognized a *limited* government contractor immunity in the case of defective military products;[11] but here the state defendants ask for *complete* immunity before the facts revealing the nature and extent of their involvement have even been discovered.

If the issue was properly before this Court we would agree that the policy factors applying to the allowance or prohibition of a *Bivens* action against federal officers are logically applicable to a civil rights action against state officers. We would also rely on the previous discussion concerning a *Bivens* action and FTCA action under the unique facts in this case.

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11. *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

If certiorari review is accepted, the Petitioners have substantially argued the merits already, as we have had to do in response, and further briefing would be repetitive. We believe this Court could invoke Supreme Court Rule 23 (1), and consider the merits on the basis of these briefs.

Respectfully submitted,

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November, 1986

APPENDIX

APPENDIX A

DOCKET ENTRIES

CIV JAG 8141

STANLEY, JAMES B.
Plaintiff,

vs.

CENTRAL INTELLIGENCE AGENCY; UNITED STATES DEPARTMENT OF DEFENSE; U. S. ARMY; (JOSEPH R. BERTINO, M.D. BOARD OF REGENTS UNIVERSITY OF MARYLAND; H.D. COLLIER; ALBERT DREISBACH; BERNARD G. ELFERT, M.D.; RICHARD HELMS; GERALD KLEE, M.D.; VAN SIM, M.D.; WALTER WEINTRAUB; M.D. & UNKNOWN INDIVIDUAL FEDERAL & STATE AGENTS & OFFICERS.)
Add'l defts. per 2nd amended complaint,
Defendants.

PERSONAL INJURY: 28 U.S.C.A. 1346(b), 2671 et seq.

SUIT FOR DAMAGES:

CAUSE

Alleges defts' were negligent in administering the drug (LSD) in the experimentation, tests.

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DATE	NR.	PROCEEDINGS
1982		
Sept 8	131	NOTICE of Supplemental Authority by defts. (Pleading from Appeal U.S. District Court for the District of South Dakota # 82-1041).
21	132	NOTICE of Supplemental Authority by defts.
Oct 6	133	NOTICE of Supplemental Authority by defts.

8 134 LETTER from Richard A. Kupfer, Esq., to Judge Gonzalez, Jr. RE: Pending Pleadings & Assistance to court in Resolving Pending Issues.

8 135 LETTER from Richard A. Kupfer, Esq., to Judge Gonzalez, Jr., RE: Oral Argument on 11/12/81 & Whether Bivens cause of Action can be said to accrue.

8 136 NOTICE of Supplemental Authority by Pltf.

15 137 ORDER (JAG) Upon Defts' Motion to Dismiss or in the Alternative Motion for Summary Judgment it is ORDERED that claims against Gov't brought under Federal Tort Claims Act, the Motion to Dismiss is GRANTED. As to Claims against the Gov't brought pursuant to Bivens, the Motion to Dismiss is GRANTED. As to Claims against the Unknown Individual Federal Agents & Officers, the Motion to Dismiss is DENIED. (EOD 11/3/82) (see original pleading for details).

29 138 MOTION for Partial Final Judgment by defts., Central Intelligence agency, U.S. Dept of Defense, U.S. Army & U.S. of America. NR

29 139 MEMORANDUM of Law in Support of above Motion.

29 140 SUGGESTION of Interest of the U.S.

Nov 3 141 MOTION for Extension of Time to Respond to Defts' Motion for Partial Final Judgment by Pltf. NR

10 142 ORDER (JAG-11/09/82) Motion for Partial Final Judgment by Deft., USA is Granted; The clerk to enter final judgment in favor of USA; Claims against individual defts. vacated and withdrawn. (EOD-11/15/82). (m-11/24/82).

17 143 MOTION to Proceed with discovery & Have court enter order cancelling Stay of Discovery by Pltf. NR 152

18 144 MOTION for rehearing by pltf. NR 151

18 145 RESPONSE to Motion for Partial Final Judgment & Suggestion of Interest by Pltf.

18 146 CERTIFICATE of service of Motion for rehearing & Response to Motion for partial final judgment by pltf.

18 147 ORDER (JAG-11/17/82) DENIED as Moot Pltf's Motion for extension of time to respond to deft's Motion for partial final judgment. (EOD 11/23/82)

22 148 OPPOSITION to Pltf's Motion to proceed with discovery & have court enter Order cancelling stay of discovery by defts.

23 149 FOURTH Notice of Supplemental Authority by Pltf.

30 150 REPLY to motion for rehearing and response by defts.

Dec 10 151 ORDER (JAG-12/8/82) denying pltf's Motion for rehearing of court's Order 11/9/82. (EOD 12/14/82)

16 152 ORDER (JAG-12/15/82) granting pltf's motion to proceed with discovery & vacating court's previous order staying discovery. (EOD 12/21/82)

APPENDIX B

(Filed May 14, 1984)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-2018
84-2019

JAMES B. STANLEY,
Plaintiff-Respondent,

versus

UNITED STATES and JOSEPH
R. BERTINO, Et Al.,
Defendants-Petitioners.

Appeal from the United States District Court for the
Southern District of Florida

Before GODBOLD, Chief Judge, RONEY and TJOFLAT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that motion Federal defendants for permission to appeal pursuant to USC 28 1292(b) is denied.

IT IS FURTHER ORDERED that motion of Maryland defendants for permission to appeal pursuant to USC 28 1292(b) is denied.

(3)

Supreme Court, U.S.
FILED
NOV 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-393

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

JAMES B. STANLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

1. a. Respondent argues (Br. in Opp. 10-11), contrary to our claim that the time to appeal from the dismissal of his FTCA claims has long passed (Pet. 9-10), that no final judgment of dismissal was entered properly. Petitioner contends that the district court's dismissal of his FTCA claims in 1982 was ineffective because no separate judgment in favor of the United States was entered pursuant to Fed. R. Civ. P. 58 and 79(a).

There is no merit to respondent's claim that the district court failed to enter a proper final judgment. The district court wrote a lengthy memorandum (Pet. App. 56a-66a) on October 15, 1982, that concluded that respondent's FTCA claims should be dismissed. On November 9, 1982, the court entered a final judgment order (*id.* at 54a-55a) granting the United States' motion for partial final judgment pursuant to Fed. R. Civ. P. 54(b). That separate order fully complied with the requirements of Rule 58. See *Beaudry Motor Co.* v. *Abko Properties, Inc.*, 780 F.2d 751, 753-755 (9th Cir. 1986).[1]

[1] This case is therefore different than cases where a memorandum and order are entered as a single document. Cf. *Amoco Oil Co.* v. *Jim Heiling Oil & Gas, Inc.*, No. 85-2107

Respondent contends (Br. in Opp. 10) that the order of November 9, 1982, is deficient because it provides that "the clerk shall enter final judgment in favor of the United States"; respondent apparently contends that the order should have read "final judgment is entered in favor of the United States." There is no substance to this hyper-technical argument. The entry in the docket provided that partial final judgment had been entered in favor of the United States (Br. in Opp. App. A4). Moreover, respondent understood that the court had dismissed the United States. In a letter to the district court on June 21, 1983, respondent's counsel stated that "[l]ast October you wrote a detailed order * * * wherein you dismissed the Plaintiff's FTCA claim against the U.S. Government due to the *Feres* doctrine" (App., *infra*, 2a). The court of appeals also understood that the FTCA claims had been dismissed. It noted that "[u]pon motion by the government, on November 9, 1982, the district court entered final judgment in favor of the government" (Pet. App. 5a).

(Nov. 17, 1986) (Blackmun & O'Connor, JJ., dissenting from denial of certiorari). As the advisory committee notes state, one purpose of Rule 58 was to clarify that, in addition to a memorandum opinion containing "some apparently directive or dispositive words," a separate order must be entered (28 U.S.C. App. at 627-628). Here, in addition to the opinion issued on October 15, 1982 (Pet. App. 56a-66a), the court entered a separate order on November 9, 1982 (*id.* at 54a-55a).

Furthermore, the requirements of Rule 58 are expressly "[s]ubject to the provisions of Rule 54(b)." All that should be required to start the time for filing a notice of appeal in a case involving a partial final judgment is compliance with Rule 54(b). A central purpose of Rule 54(b) certification is to provide a certain starting point for conducting an appeal from an otherwise interlocutory order. Certification itself thus serves the function served by the "separate document" requirement of Rule 58.

The clerk entered the final judgment on the civil docket, as required by Rule 79(a), on November 10, 1982. The entry states: "Motion for Partial Final Judgment by Deft., USA is Granted" (Br. in Opp. App. A4). That entry fully complied with the requirements of Rule 79(a). See *Beaudry*, 780 F.2d at 755. Accordingly, under Fed. R. App. P. 4(a)(1) the time to appeal expired in January 1983.[2]

In any event, respondent has not responded to our argument (Pet. 10) that the court of appeals lacked jurisdiction over the FTCA claims because this case was before the court on an interlocutory appeal pursuant to 28 U.S.C. 1292(b) to consider the district court's refusal to dismiss respondent's *Bivens* claims. As the court of appeals noted (Pet. App. 6a), the basis of its jurisdiction was its grant of the individual defendants' motion for interlocutory appeal to review the district court's order of October 28, 1983, where the court refused to dismiss the *Bivens* claims. On an interlocutory appeal, "the scope of the issues open to the court of appeals is closely limited to the order appealed from" and does not extend to "matters ruled upon in other orders" (16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* 143 (1977)); *Pritchard-Keang Nam Corp.* v. *Jaworski*, 751 F.2d 277, 280-281 n.3 (8th Cir. 1984), cert. dismissed, 472 U.S. 1022 (1985); *United States* v. *Bear Marine Services*, 696 F.2d 1117, 1118-1119 n.1 (5th Cir. 1983).

Accordingly, it was clear error to review the November 9, 1982, dismissal of the FTCA claims on an

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[2] Respondent states (Br. in Opp. 9-10) that no notice of entry of judgment was mailed by the clerk to the parties as required by Fed. R. Civ. P. 77(d). Even if this assertion is correct, such a failure would be irrelevant since Rule 77(d) expressly provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed."

interlocutory appeal from the October 28, 1983, order refusing to dismiss the *Bivens* claims. This error is egregious since the United States was not even a party to the interlocutory appeal and the FTCA issue was not briefed. Thus, even if respondent's time to appeal the November 9, 1982, order dismissing the United States had not run, the court of appeals lacked jurisdiction over his FTCA claims. The court of appeals' sua sponte assertion of jurisdiction over the FTCA claims on an interlocutory appeal challenging the district court's refusal to dismiss the *Bivens* claims has so far departed from the accepted course of judicial proceedings to warrant an exercise of this Court's supervisory jurisdiction.[3]

b. We also showed in our petition (at 10-13) that the court of appeals erred in holding that controlling precedent does not "preclude Stanley's lawsuit under the FTCA * * * upon a finding that he suffered the complained of injury while performing duties incident to military activities" (Pet. App. 19a). Respondent asserts (Br. in Opp. 12-13) that his injuries were not incurred incident to military service because, at the time he was given LSD, he had been released from his regular duty status and "had complete control over his movements" (*id.* at 13). The Fifth Circuit rejected that argument when it considered this case in 1981 (Pet. App. 72a-74a), and the court of appeals did not dispute that holding in

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[3] Respondent asserts (Br. in Opp. 11) that he would be able to obtain relief under Fed. R. Civ. P. 60(b). However, we know of no authority—and respondent cites none—authorizing a court of appeals to reopen a final judgment more than three years after it was entered because (as the court of appeals incorrectly concluded (Pet. App. 17a)) controlling authority had changed in the interim. Moreover, such a rule would obviously prevent parties from ever knowing with any certainty that a case had been resolved. Such a holding would also completely bypass the district court and its role in adjudicating Rule 60(b) motions.

concluding that respondent's FTCA claims are not necessarily barred (see *id.* at 16a). There is simply no merit to petitioner's assertion that he was not injured incident to service because he was, by his own agreement, in a unique duty status.[4]

Since we filed our petition, this Court granted certiorari in *United States* v. *Johnson*, No. 85-2039, to decide whether a service member injured incident to service may pursue FTCA claims alleging negligence on the part of civilian federal employees. As we argued in our brief in *Johnson*,[5] this Court has consistently held that a service member's claims under the FTCA are barred if they were incurred incident to military service. Indeed, the court in *Johnson* acknowledged that claims based on injuries incurred incident to military service are barred where the alleged tortfeasor, like those here, was a "member of the armed forces or a civilian employee engaged in activities usually associated with the armed forces" (85-2039 Pet. App. 25a). The court of appeals' contrary holding in this case warrants reversal.[6]

2. As we also showed in our petition (at 14-18), the court of appeals clearly erred in permitting re-

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[4] While arguing that his duty status at the time involved substantial freedom of action on his part, so that a trial in this case would not impact adversely on military discipline (Br. in Opp. 12-13), respondent emphasizes that he was not a true volunteer because his consent was obtained by fraud (*id.* at 2, 12). In arguing that a trial in this case would not "require a civilian court to second-guess the wisdom of military decisions" (*id.* at 13), respondent is obviously incorrect. The central issue in a trial in this case would be whether the military erred in deciding to use Army volunteers in conducting chemical warfare tests in the late 1950s.

[5] We have furnished a copy of our brief in *Johnson* to counsel for respondent.

[6] If this case is not disposed of summarily (see pages 9-10, *infra*), the Court should either review the FTCA question (Question 1) or hold it for disposition in light of *Johnson*.

spondent to go forward with his *Bivens* claims since this Court held in *Chappell* v. *Wallace*, 462 U.S. 296, 305 (1983), that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." Respondent erroneously asserts (Br. in Opp. 15) that this case is distinguishable from *Chappell* because he is not suing "superior officers." The basis for the decision in *Chappell* was that " '[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters' " (462 U.S. at 301, quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953)). Respondent's amended complaint alleges that the individual federal defendants "were acting under color of a covert army program * * * which was implemented by the United States Government, the Central Intelligence Agency, the United States Department of Defense and the U.S. Army" (¶ 20). Clearly, as respondent alleges in his complaint, he was administered LSD as part of an official Army drug experimentation program. That program was developed and administered by respondent's superiors, and it is their decisions that he challenges. This Court barred the plaintiffs in *Chappell* from going forward with *Bivens* claims to prevent civilian courts from reviewing just the sort of challenges to military decisions that respondent seeks to raise here.[7]

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[7] The Court also based its holding in *Chappell* on the fact that Congress had provided alternative avenues by which service members could obtain relief. We noted in our petition (at 17-18) that Congress had provided that persons such as respondent could obtain veterans' benefits if they suffered injury incident to service. Respondent complains (Br. in Opp. 21) that he has not obtained disability benefits under the Veterans' Benefits Act, and suggests (*id.* at 19 n.9) that we concede that the Act does not provide him with a remedy. These statements demonstrate misunderstanding of the Act

There is no merit to respondent's assertion (Br. in Opp. 16-17) that the decision below does not conflict with decisions of other circuits. The court in *Mollnow* v. *Carlton*, 716 F.2d 627, 630 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984), held that "the Court [in *Chappell*] necessarily imposed a *per se* prohibition on the filing of *Bivens*-type actions by servicemen against their superiors." Respondent states (Br. in Opp. 16) that the district court distinguished *Mollnow* at Pet. App. 32a-33a; however, the district court did not cite the *Mollnow* decision. Respondent also suggests that the Ninth Circuit "seemed to take a different view of *Chappell*" (Br. in Opp. 16) in *Gonzalez* v. *Department of the Army*, 718 F.2d 926, 929 (1983). That assertion is also wrong; indeed, *Gonzales* did not involve a *Bivens* claim.[8] The decision here clearly conflicts with the decision in *Mollnow*.

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and our position. Respondent does not allege that he applied for veterans' disability benefits, and we are informed that he has not applied; of course, a person must apply in order to obtain benefits. 38 U.S.C. 3001(a). If respondent demonstrates that he suffers from a disability as a result of his ingestion of LSD in 1958, then he is entitled to compensation. 38 U.S.C. 331. Furthermore, as *Chappell* makes clear, it is not the adequacy of the remedy, but rather Congress's "activity in the field" (462 U.S. at 304), that constitutes the "special factor" which led this Court to conclude that a *Bivens* remedy is not available to military personnel for torts allegedly committed by their superior officers.

[8] The court held in *Gonzalez* that a service member could not bring a claim that he had been denied a promotion because of race discrimination against the Army and the Secretary of the Army under 42 U.S.C. 1981. The court explained that "the court would be required to scrutinize numerous personnel decisions by many individuals as they relate to appellant's claim that he was improperly denied promotion. This inquiry would involve the court in a very sensitive area of military expertise and discretion. While we would not shrink from such an assessment in a civilian setting, the same hesitation that precludes a *Bivens*-type claim in the military setting, *see Chappell* * * *, compels restraint here." 718 F.2d at 930.

The decision here also conflicts with the decisions in *Gaspard* v. *United States*, 713 F.2d 1097 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984), and *Jaffee* v. *United States*, 663 F.2d 1226 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982). Contrary to respondent's claim (Br. in Opp. 17), *Gaspard* and *Jaffee* are not distinguishable because they involved a direct order while this case did not. Nothing in this Court's decision in *Chappell* supports the conclusion that, in order to determine whether a service member may go forward with a *Bivens* action, a court should determine whether the claim revolves around some identifiable order that had been issued to the service member. Rather, the Court's decision was based on its conclusion that civilian courts are ill-equipped to review military orders of any type (see 462 U.S. at 301-302). As the Fifth Circuit stated in *Gaspard*, under *Chappell* a court is barred "from inquiring into monetary damages when a service person is injured" incident to service (713 F.2d at 1103).

The Third Circuit recently made its conflict with the decision here even more clear. That court stated, in concluding that the plaintiff there could not bring a claim against Pennsylvania National Guard officers under 42 U.S.C. 1983, that "the *Stanley* court misread *Chappell*." *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 107 (1986). Contrary to the approach followed by the courts below, the Third Circuit stated that this Court's decision in *Chappell* "la[id] down a general rule barring damages actions by military personnel against superior officers for constitutional violations, rather than authorizing a fact-specific inquiry." *Id.* at 108. Accordingly, there is a clear conflict between the decision here and the decisions of other courts of appeals. Indeed, the courts below are the only courts that have not read *Chappell* to bar

Bivens actions by service members.[9] Unless this case is dealt with summarily (see pages 9-10, *infra*), the *Bivens* question (Question 2) warrants plenary review to resolve the conflict in the circuits.[10]

3. Respondent concludes (Br. in Opp. 23) that "further briefing would be repetitive" so that summary disposition of this case is appropriate under Rule 23.1 of the Rules of this Court. Since this Court will hear argument in *Johnson* on the question whether the *Feres* doctrine is applicable in an FTCA action alleging negligence on the part of civilian

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[9] Respondent states that the Eighth Circuit recently held in *Brown* v. *United States*, 739 F.2d 362 (1984), cert. denied, No. 84-636 (July 1, 1985), that a plaintiff could "bring a *Bivens* action even though an FTCA claim could not be prosecuted under the *Feres* doctrine" (Br. in Opp. 17-18). As an initial matter, *Brown* did not involve a *Bivens* claim; rather, the plaintiff sought to bring suit against his superior officers and fellow service members under 42 U.S.C. 1981 and 1983. Moreover, the analysis in that case supports our position rather than respondent's. The plaintiff's claim in *Brown* was that his fellow national guardsmen led him to believe "that he was being taken by a lynch mob" (739 F.2d at 364). The court held that the plaintiff could not pursue claims against superior officers alleging that they failed to prevent the incident and investigate it properly because those claims would involve second-guessing of military decisions (*id.* at 369). The court permitted the plaintiff to bring suit against the plaintiff's fellow guardsmen, however, concluding that "a racially tinged mock hanging of a fellow soldier * * * served no conceivable or remotely military purpose" (*id.* at 368). An analogous claim would be presented here if respondent claimed that fellow service members gave him LSD as a misguided prank rather than as part of an official Army program.

[10] Contrary to respondent's claim (Br. in Opp. 7-8), the interlocutory posture of this case provides no reason to forego review. A primary purpose underlying the *Feres* doctrine and the Court's refusal to permit *Bivens* suits is to avoid having civilian courts second-guess military decisions. *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 6. Permitting a trial to go forward in this case would require just such second-guessing.

federal employees, in most circumstances the FTCA question (Question 1) would, at a minimum, be held for *Johnson*. However, because the court of appeals so clearly erred in reviving the FTCA issue which was not before it and which had been dismissed without appeal in 1982, we agree that summary action may be warranted on this issue.

We believe that the *Bivens* question (Question 2) is also sufficiently clear that the Court may wish to consider summary reversal. This Court clearly stated in *Chappell* that claims such as respondent's are barred: "We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." 462 U.S. at 305. As we have shown, all of the courts other than the courts below have understood *Chappell* to bar claims such as respondent's.[11]

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted. The Court should either order briefing on the merits or vacate the court of appeals' decision and remand with instructions to dismiss respondent's complaint.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

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[11] Even counsel for respondent believed at one point in this litigation that *Chappell* barred respondent's *Bivens* claims. He stated, in a letter to the district court shortly after the decision in *Chappell*, that "we are ethically compelled to cite to the court a recent Supreme Court decision which, we regret to say, is apparently dispositive of this case" (App., *infra*, 1a). Counsel went on to say that the Court in *Chappell* "held that the same principles which underly [*sic*] the *Feres* doctrine and which require absolute immunity from an FTCA action also require immunity from a *Bivens* constitutional action against federal officers" (*id.* at 2a).

APPENDIX

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June 21, 1983

Honorable Jose A. Gonzalez, Jr.
U.S. District Court Judge
Southern District of Florida
Federal Courthouse Building
299 East Broward Blvd.
Ft. Lauderdale, FL 33301

Re: Stanley v Bertino, et al, and Unknown
Individual Federal Agents and Officers

Dear Judge Gonzalez:

We feel we are ethically compelled to cite to the court a recent Supreme Court decision which, we regret to say, is apparently dispositive of this case. This is the case involving the former military serviceman who was suing the United States government and individual federal officers for secretly introducing LSD into his bloodstream during the course of a covert military drug experimentation program in the late 1950's.

Last October you wrote a detailed order which is now published; *Stanley v U.S.*, 549 F.Supp. 327 (S.D. Fla. 1982); wherein you dismissed the Plaintiff's FTCA claim against the U.S. Government due to the *Feres* doctrine; however, you held that our constitutional *Bivens* claim against individual federal officers was not barred by *Feres* and you declined to dismiss our *Bivens* claim. In upholding our *Bivens* claim you relied on and cited *Wallace v Chappell*, 661 F.2d 729 (9th Cir. 1981). You also denied Defendants' statute of limitations challenge to the *Bivens* claim.

Presently pending before this court is the Defendants' motion again raising statute of limitations arguments and also seeking dismissal on grounds of improper venue and lack of personal jurisdiction, and our response and alternative motion to transfer venue to Maryland. However, it now seems that all those issues may be moot because the Supreme Court has just reversed the *Wallace v Chappell* case which you relied on previously to uphold our *Bivens* claim.

We are enclosing a copy of the Supreme Court's opinion in *Chappell v Wallace* which was just filed last week and published in U.S. Law Weekly. Unfortunately the Supreme Court has just held that the same principles which underly the *Feres* doctrine and which require absolute immunity from an FTCA action also require immunity from a *Bivens* constitutional action against federal officers.

Since we argued to the contrary previously in reliance on the Ninth Circuit's opinion in *Wallace v Chappell*, before it was just reversed, and since you were persuaded to follow the Ninth Circuit and you published your order in Federal Supplement, we feel it is our obligation as officers of the Court to report

to you what has just happened to the *Wallace v Chappell* case in the Supreme Court. We do so with great regret because we feel what the government has done to Plaintiff and others like him is reprehensible, however, it unfortunately seems that we are not allowed to obtain redress in the civil courts.

We greatly appreciate the time and thoughtful consideration you have given to this case during the course of this litigation.

Respectfully yours,

/s/ Ward Wagner, Jr.
WARD WAGNER, JR.

WW/dc

Enclosure

cc: John L. Euler, Esq.
John J. Farley, III, Esq.
J. Paul McGrath, Esq.
Alan Mishael, Esq.
James J. Mingle, Esq.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40109

Supreme Court, U.S.
FILED
JAN 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 86-393

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

JAMES B. STANLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 9, 1986
CERTIORARI GRANTED DECEMBER 8, 1986

1811

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*The opinions and judgments of the court of appeals and of the district court are printed in the appendix to the petition for a writ of certiorari and have not been reproduced here.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5273

JAMES B. STANLEY, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS-APPELLANTS

RELEVANT DOCKET ENTRIES

4/21/86	AFFIRMED in pt., and REVERSED in pt.
6/17/86	ORDER DENYING REHEARING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 78-8141-CIV-JAG

JAMES B. STANLEY, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS

RELEVANT DOCKET ENTRIES

Nov. 10, 1982	ORDER (JAG-11/09/82) Motion for Partial Final Judgment by Deft., USA is GRANTED; The clerk to enter final judgment in favor uf [sic] USA; Claims against individual defts. vacated and withdrawn. (EOD-11/15/82). (m-11/24/82).

BEST AVAIL

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 78-8141 CIV-JAG

JAMES B. STANLEY, PLAINTIFF,

v.

JOSEPH R. BERTINO, M.D.; BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND; H.D. COLLIER; ALBERT DREISBACH; BERNARD G. ELFERT; SIDNEY GOTTLIEB, M.D.; RICHARD HELMS; GERALD KLEE, M.D.; VAN SIM, M.D.; WALTER WEINTRAUB, M.D.; AND UNKNOWN INDIVIDUAL FEDERAL AND STATE AGENTS AND OFFICERS, DEFENDANTS.

FEB [illegible] 1983

SECOND AMENDED COMPLAINT

Plaintiff sues the Defendants and alleges:

JURISDICTIONAL STATEMENT

1. This action is brought pursuant to this Court's federal question jurisdiction, 28 U.S.C. § 1331, and pursuant to 42 U.S.C. § 1983, 1985, and arises under the Constitution of the United States.

VENUE STATEMENT

2. Plaintiff is a resident and citizen of the United States, State of Florida, County of Palm Beach. Defendant, JOSEPH R. BERTINO, M.D., is a resident and

ABLE COPY

citizen of the State of Connecticut; Defendant, BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND, is, upon information and belief, an agency or political subdivision of the State of Maryland; Defendants, SIDNEY GOTTLIEB, M.D., GERALD KLEE, M.D., VAN SIM, M.D., and WALTER WEINTRAUB, M.D., are, upon information and belief, residents and citizens of the State of Maryland. The remaining Defendants' identities and/or places of residences and citizenship are presently unknown.

COUNT I
(BIVENS ACTION)

3. In 1958, Plaintiff was a Master Sergeant in the United States Army, stationed with his wife and children at Fort Knox, Kentucky. Plaintiff had received multiple military honors, including the bronze star medal for valor, purple heart, good conduct medal and presidential unit citation. Plaintiff volunteered in February, 1958 to participate in a program at the Chemical Warfare Laboratories at Army Chemical Center, Aberdeen Proving Grounds, Edgewood Arsenal, the purpose of which was purportedly for development and testing of methods of defense against chemical warfare attack, including testing of various gas masks and protective clothing. Plaintiff was given a release from his regular duties to participate in the program.

4. The Defendants deliberately gave Plaintiff false information regarding the true nature of the covert program for which Plaintiff had volunteered. During interviews with military and civilian personnel at Edgewood Arsenal, Plaintiff was asked to drink a clear liquid which appeared to be a glass of water. Unbeknownst to Plaintiff, the liquid contained lysergic acid diethylamide, commonly known as LSD. Plaintiff unknowingly ingested the dangerous drug on four occasions during the month of

February, 1958 (believed to be on or about February 12, 19, 20 and 26, 1958) and experienced severe reactions including hallucinations, but he did not know the source of these reactions. Plaintiff was not informed of the true nature of the testing program nor the risks involved, and Defendants intentionally withheld such information since it was an integral part of the program to have the unwitting and uninformed subjects for testing.

5. The following month, Plaintiff returned to active duty at Fort Knox, but in an altered behavioral and emotional state. Plaintiff periodically lapsed into intervals of incoherency and had no recall of such events afterwards. The periods were sometimes marred by violence and, on occasion, Plaintiff would awake from sleep at night and, without reason, violently beat his wife and children, later being unable to recall the entire incident. Plaintiff was thereafter unable to perform his military duties efficiently and was reduced in rank for inefficiency. At times Plaintiff would be absent without leave and could not recall his whereabouts when questioned.

6. In 1969 Plaintiff was discharged from the Army, still unaware that he had been duped into ingesting LSD years earlier. From 1958 until his discharge in 1969, Defendants intentionally concealed this information from Plaintiff in order to continue to observe his "unwitting reaction." For this period from 1958 until 1969, Plaintiff, although uninformed, was at least in a position to be observed and monitored by Defendants as part of their covert program in human drug experimentation.

7. Upon and subsequent to Plaintiff's discharge from the Army in 1969, Defendants were grossly negligent in failing to debrief and inform Plaintiff of the 1958 episode and in failing to continue to monitor his condition as it would relate to his civilian life thereafter.

8. Plaintiff suffers continuing and permanent psychologial [*sic*] injuries long after the 1958 incident, due to Defendants' negligent failure to debrief him and to con-

tinue to monitor his condition after discharge, and to provide follow-up medical care or instruct Plaintiff to seek such medical care on his own. Plaintiff's bizarre behavioral changes eventually resulted in a breakdown and dissolution of his marriage and family life one year after his discharge, in 1970. Plaintiff suffers injury to this day and will continue to suffer in the future.

9. In December, 1975, Plaintiff received a letter from the Department of the Army, Walter Reed Army Medical Center, which disclosed for the first time that Plaintiff had been secretly given LSD during February, 1958. This was the first time Plaintiff realized that he had been used as an unwitting subject for the study of the long-range medical and psychological effects of LSD, rather than being merely a volunteer in testing chemical warfare equipment and clothing. The 1975 letter solicited Plaintiff's participation in a follow-up study of subjects who participated in the 1958 LSD experiments. This letter, however, did not disclose the names of the individual Defendants, whose names were recently discovered as set forth in paragraph 10, below.

10. Plaintiff filed administrative claims with the United States Army and the Central Intelligence Agency, which were denied. His administrative claim against the U.S. Army was denied with a statement that his claim was not compensable under any statute, regulation or appropriation available to the Army Claims Service, and the Claims Division advised Plaintiff, if he was dissatisfied, to file suit in the United States District Court. An FTCA suit was filed in 1978; however, all discovery has been stayed until the present so that Plaintiff was unable to discover the names of most of the Defendants until same became available on the record of *Sweet v. United States*, a similar case tried in South Dakota in 1982.

11. The wrongful act of the Defendants consists of an intentional act which [*sic*] Plaintiff was on active duty and

subsequent negligent failure to protect Plaintiff, after becoming a civilian, from the dire consequences flowing from the original wrong. The post-discharge negligence is a separate wrong occurring after civilian status was attained.

12. Defendants' post-discharge negligence aggravated and prolonged Plaintiff's condition.

13. Defendants knew, or should have known, that LSD is a consciousness and behavior altering drug capable of producing irreparably harmful results, including death, and that the drug would affect different persons in different unpredictable ways. Defendants negligently failed to debrief Plaintiff after his discharge to advise of the potentially hazardous physiological and psychological effects and the need for continued professional observation and treatment; and Defendants negligently failed to continue to monitor Plaintiff following his discharge.

14. The actions and omissions of the Defendants, federal executive department officials and agents, who were acting under color of a covert federal Army problem [*sic*] and pursuant to such program which was implemented by the United States Government, violated and deprived Plaintiff of his fundamental, justiciable constitutional rights as a citizen of the United States. It is such official policy that is responsible for the deprivation of Plaintiff's constitutional rights.

15. Plaintiff's constitutional right to privacy has been wrongfully invaded by Defendants' surreptitious administration of a dangerous, unpredictable hallucinogenic and behavior altering drug into Plaintiff's bloodstream. The privacy interest invaded is the most fundamental of all, to-wit, the right of bodily integrity and the right to control one's own intellectual thought process.

16. The introduction of LSD into Plaintiff's bloodstream involved considerable and unpredictable risk and trauma, in an attempt to alter or control the content

of Plaintiff's private thoughts. In this way Plaintiff's fundamental right to privacy of the mind and body has been recklessly, willfully and wantonly invaded by federal officers acting pursant to an adopted federal covert human drug experimentation program.

17. The constitutional right to privacy has been held to be implicit in the First, Third, Fourth and Ninth Amendments to the Constitution of the United States, and has also been held to be implicit in the concept of liberty within the Fifth Amendment Due Process Clause, and generally within the "penumbras" of the Bills [*sic*] of Rights. The right to privacy also protects marriage and family relationships.

18. As a direct and proximate result of this most destestable and outrageous violation of Plaintiff's constitutionally protected rights, Plaintiff has suffered damages, before and after his discharge from the Army, as follows: physical and mental anguish; disability and loss of capacity for the enjoyment of life; loss of working ability and consequent loss of income; the disruption and termination of a promising Army career; severe and permanent physical, mental and psychological injuries, said injuries are permanent and continuing in nature and Plaintiff will suffer from such losses and injuries in the future; and the disruption, breakdown and dissolution of Plaintiff's marriage and family life.

WHEREFORE, Plaintiff demands judgment against all Defendants for compensatory damages, punitive damages, attorneys' fees and costs of this litigation and further demands trial by jury.

COUNT II

(VIOLATION OF 42 U.S.C. § 1983)

19. Plaintiff realleges and incorporates each and every preceding averment and for an alternative cause of action alleges the following facts.

20. Upon information and belief, the unwitting human LSD testing program aforesaid was carried on by the Defendants pursuant to, or by means of, an agreement or contract between the BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND, its divisions, agencies, and/or employees, and one or more unknown federal agencies.

21. At all material times in the conduct of this program, the Defendants acted as independent contractors in that they maintained and exercised discrete operational control over the day-to-day conduct of the unwitting human LSD testing program, and in particular, in their dealings with the Plaintiff.

22. At all material times, the Defendants were employees of, as joint venturers with the BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND, a state agency, and acted at all times under color of law.

23. The Defendant's acts and omissions detailed in Count I hereof violated 42 U.S.C. § 1983 by depriving the Plaintiff of rights secured by the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the U.S. Constitution.

24. As a direct and proximate result of this outrageous behavior, Plaintiff was injured as more fully described in Count I, paragraph 18 of the Complaint.

WHEREFORE, Plaintiff demands judgment against all Defendants for compensatory damages, punitive damages, attorneys' fees and costs of this litigation and further demands trial by jury.

COUNT III

(VIOLATIONS OF 42 U.S.C. § 1985 – CONSPIRACY)

25. Plaintiff realleges and incorporates each and every preceding averment and for his third cause of action alleges the following facts.

26. The Defendants' acts and omissions aforesaid were committed in furtherance of a conspiracy among two or more of the Defendants to deprive the Plaintiff of the equal protection of the laws, or of equal privileges and immunities under the laws, so as to violate 42 U.S.C. § 1985.

27. As a direct and proximate result of such conspiracy among the Defendants, the Plaintiff was injured as more fully set forth in Count I, paragraph 18 above.

WHEREFORE, Plaintiff demands judgment against all Defendants for compensatory damages, punitive damages, attorneys' fees and costs of this litigation and further demands trial by jury.

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing has been furnished this 3rd day of February, 1983, to ALAN MISHAEL, ESQUIRE; JOHN L. EULER, ESQUIRE; JOHN J. FARLEY III, ESQUIRE; STANLEY MARCUS, ESQUIRE; Torts Branch—Civil Division, U.S. Department of Justice, Washington, D.C. 20530, (202) 724-6748; DAVID BULLOCK, ESQUIRE, Department of the Army (DAJA-LTM), Washington, D.C. 20310, (202) 695-1700; and J. PAUL McGRATH, Assistant Attorney General, Torts Branch—Civil Division, U.S. Department of Justice, Washington, D.C. 20530, (202) 633-3306.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-8141 CIV-JAG

JAMES B. STANLEY, PLAINTIFF,

v.

JOSEPH R. BERTINO, M.D.; BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND; H.D. COLLIER; ALBERT DREISBACH; BERNARD G. ELFERT; SIDNEY GOTTLIEB, M.D.; RICHARD HELMS; GERALD KLEE, M.D.; VAN SIM, M.D.; WALTER WEINTRAUB, M.D.; AND UNKNOWN INDIVIDUAL FEDERAL AND STATE AGENTS AND OFFICERS, DEFENDANTS.

FEB 27, 1984

ORDER

THIS MATTER came on before the Court upon defendants' Motion for an Order of Certification under 28 U.S.C. § 1292(b) and plaintiff's response thereto.

The Court, upon considering the entire record of this case and being fully advised in the premises, hereby rules that defendants' Motion will be and the same is GRANTED.

In Accordance with this Court's Order of January 31, 1984,

IT IS ORDERED, ADJUDGED AND DECREED that this Court's October 28, 1983 Order, *Stanley v. United States*, 574 F.Supp. 474 (S.D. Fla. 1983), is certified by this Court pursuant to 28 U.S.C. § 1292(b) to involve a controlling question of law as to which there is substantial

ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

SO ORDERED.

DATED the 23rd day of February, 1984.

/s/ JOSE A. GONZALEZ
Jose A. Gonzalez
United States District Judge

Copies furnished to:

John Euler, Esq.
Alan Mishael, Esq.
John Romano, Esq.
James Mingle, Esq.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-2018
No. 84-2019

JAMES B. STANLEY, PLAINTIFF-RESPONDENT,

v.

UNITED STATES OF AMERICA AND JOSEPH R. BERTINO, ET AL., DÈFENDANTS-PETITIONERS.

Appeal from the United States District Court for the Southern District of Florida

---

Filed APR 13, 1984

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

BY THE COURT:

Presently pending before this court are motions by the Petitioners for interlocutory appeal from a district court order denying their motions to dismiss Respondent's complaint. Originally, Petitioners appealed the district court order under 28 U.S.C. § 1291 without first asking the district court to certify the case as appropriate for interlocutory review under 28 U.S.C. § 1292(b). After Respondent moved this court to dismiss the appeal, Petitioners asked the district court for section 1292(b) certification, which the court granted on January 31, 1984. Before the certification order was communicated to this court, however, we entered an order on February 3, 1984, granting Respondent's motion to dismiss the appeal. Peti-

tioners then requested the district court to enter a second certification order, which the court granted on February 27, 1984.[1] Relying this time on the certification order, Petitioners moved this court to exercise the discretion granted us by 28 U.S.C. § 1292(b) to review the "otherwise nonappealable" order denying their motion to dismiss the complaint. For the reasons set forth below, we grant Petitioners' motion for permission to appeal pursuant to 28 U.S.C. § 1292(b).

Section 1292(b) authorizes the district court to certify an interlocutory order as appropriate for immediate appeal, if (1) the order involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. It is undisputed that conditions (1) and (2) are satisfied: the issue of whether the *Feres* doctrine bars the *Bivens* claims is a "controlling question of law," because an affirmative answer to that question would require dismissal of Respondent's claims against Petitioners, *see Chappell v. Wallace*, 103 S. Ct. 2362 (1983); and there is "substantial ground for difference of opinion," because two circuit courts have disagreed with the district court's order in this case, *see Gaspard v. United States*, 713 F.2d 1097 (5th Cir. 1983), and *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc).

Finally, we conclude that an immediate appeal from the order "may materially advance the ultimate termination of the litigation." From our cursory review of the record, it

[1] Since "the notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by either the district court or the appellate court," *United States v. Hitchmon*, 602 F.2d 689, 691 (5th Cir. 1979) (en banc), the district court was not without jurisdiction to enter the original certification order, *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387 (11th Cir. 1981).

BEST

appears that the events on which Respondent bases his claims transpired in 1958. Because of the complexity of those claims, the number of defendants involved and the time that has passed since those happenings, it appears that any trial in this cause may well be complicated and time-consuming. The authorities cited above are sufficient to raise a serious question concerning the viability of Respondent's *Bivens* claims in light of *Feres* doctrine. The district court was well advised to certify this matter as appropriate for interlocutory review under 28 U.S.C. § 1292(b).

Accordingly, Petitioners' motions for interlocutory appeal are GRANTED.

AVAILABLE COPY

Supreme Court of the United States

No. 86-393

UNITED STATES, ET AL., PETITIONERS

v.

JAMES B. STANLEY, ET AL.

ORDER ALLOWING CERTIORARI. *Filed December 8, 1986.*

The petition herein filed for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted.

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CLERK

No. 86-393

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

JAMES B. STANLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in reviving a Federal Tort Claims Act suit for injuries allegedly received by a serviceman during active duty participation in an official Army drug experimentation program, where the district court had entered an order under Fed. R. Civ. P. 54(b) dismissing the action pursuant to *Feres* v. *United States*, 340 U.S. 135 (1950), and no appeal was filed challenging that dismissal.

2. Whether a serviceman may pursue an action against his superior officers for alleged constitutional violations arising from his participation in an official Army drug experimentation program.

PARTIES TO THE PROCEEDING

In addition to the United States, the petitioners are Richard Helms, Joseph R. Bertino, M.D., Sidney Gottlieb, M.D., Bernard G. Elfert, Van Sim, M.D., H.D. Collier, and Albert Dreisbach. In addition, the state defendants in the proceedings below are the Board of Regents of the University of Maryland, Gerald Klee, M.D., and Walter Weintraub, M.D. The state defendants filed a petition for a writ of certiorari seeking review of the court of appeals' decision in this case. *Board of Regents of the University of Maryland, et al.* v. *Stanley, et al.*, No. 86-443. The respondent is James B. Stanley.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-393

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

JAMES B. STANLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 786 F.2d 1490. The district court's orders granting the motion to dismiss the United States and denying the motion to dismiss the individual federal defendants (Pet. App. 54a-66a) are reported at 549 F. Supp. 327 and 552 F. Supp. 619. The district court's orders reconsidering its denial of the motion to dismiss the individual federal defendants (Pet. App. 21a-53a) are reported at 574 F. Supp. 474 and 587 F. Supp. 1071. A prior opinion of the United States Court of Appeals for the Fifth Circuit affirming in part an earlier district court order in favor of the United States (Pet. App. 67a-95a) is reported at 639 F.2d 1146.

JURISDICTION

The judgment of the court of appeals was entered April 21, 1986, and a petition for rehearing was denied June 17, 1986. The petition for a writ of certiorari was filed on September 9, 1986, and was granted on December 8, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671 *et seq.*], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

1. In February 1958, respondent, then an Army enlisted man, participated in secret chemical warfare tests conducted by the United States Army at the Army's Chemical Warfare Laboratories on the Aberdeen Proving Grounds in Maryland. He volunteered to participate in the program while on active duty and was administered, without his knowledge, lysergic acid diethylamide (LSD) as part of that testing.[1]

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[1] The Army administered LSD to approximately 1,000 individuals between 1955 and 1958, partially in response to evidence that the Soviet Union had purchased a quantity of

He returned to regular duty in March 1958 and served in the Army for 11 more years. He brought suit under the Federal Tort Claims Act (FTCA) in 1978, alleging that the government had been negligent in administering the LSD and negligent in failing to monitor his condition after discharge. Plaintiff claims that, as a result of ingesting LSD, he was "unable to perform his military duties efficiently," which led to the termination of his military career in 1969, and that he periodically "without reason, violently beat his wife and children," which led to the dissolution of his marriage in 1970. J.A. 5, ¶ 5.

Plaintiff's FTCA claims were initially dismissed by the district court, which held that they were barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950). The Fifth Circuit affirmed in 1981 (Pet. App. 67a-95a). Finding that "the relationship between Stanley and the allegedly negligent individuals stemmed from their official military relationship," the court of appeals concluded that "we are compelled to conclude that the trial court correctly applied *Feres* and held the United States immune to Stanley's suit under the Federal Tort Claims Act" (*id.* at 76a, 79a). The Fifth Circuit, however, remanded the case to the district court for further proceedings, finding, without expressing any opinion on the merits, that "Stanley has at least a colorable con-

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LSD sufficient for 50 million doses. The administration of the drug to these individuals was for the purpose of "ascertain[ing] the effects of the drug on their ability to function as soldiers" and "to evaluate the validity of the traditional security training * * * in the face of unconventional, drug enhanced, interrogations." S. Rep. 94-755, 94th Cong., 2d Sess. 411-412 (1976).

stitutional claim based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 * * * (1971)" (*id.* at 94a).[2]

2. On remand, plaintiff amended his complaint to include FTCA claims against the United States and to add new *Bivens* claims against unknown military officers and civilians who had participated in the program. In 1982, the district court dismissed the amended FTCA claims on the basis of the Fifth Circuit's opinion (Pet. App. 56a-66a). However, relying on the Ninth Circuit's decision in *Wallace* v. *Chappell*, 661 F.2d 729 (1981) (Pet. App. 62a), the court declined to dismiss the *Bivens* claims against the individual defendants (*id.* at 66a). Shortly thereafter, on November 9, 1982, the district court entered, at the request of the United States, a partial final judgment dismissing all the FTCA claims pusuant to Fed. R. Civ. P. 54(b) (Pet. App. 54a-55a).[3] In the same order, the district court ordered plaintiff to identify and serve at least one individual defendant, and plaintiff thereafter filed, in 1983, a Second Amended

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[2] In so holding, the Fifth Circuit relied on a Third Circuit opinion which was subsequently overturned by the en banc Third Circuit in *Jaffee* v. *United States*, 663 F.2d 1226 (1981), cert. denied, 456 U.S. 972 (1982).

[3] Rule 54(b) provides in pertinent part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Complaint naming the individual petitioners.[4] Plaintiff did not appeal the entry of the final judgment dismissing his FTCA claims.

Subsequently, this Court reversed the Ninth Circuit's decision in *Chappell*, holding that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." *Chappell* v. *Wallace*, 462 U.S. 296, 305 (1983) (footnote omitted). The Court ruled that preclusion of the *Bivens* remedy was necessary because of " 'special factors counselling hesitation' " (462 U.S. at 298, quoting *Bivens*, 403 U.S. at 396), which the Court found in the "unique disciplinary structure of the Military Establishment and Congress' activity in the field" (462 U.S. at 304). Acting sua sponte, the district court reconsidered its

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[4] In his Second Amended Complaint, plaintiff alleged that "[t]he wrongful act of the Defendants consists of an intentional act whi[le] Plaintiff was on active duty and subsequent negligent failure to protect Plaintiff, after becoming a civilian, from the dire consequences flowing from the original wrong" (J.A. 6-7, ¶ 11). Plaintiff further alleged that "[t]he Defendants, federal executive department officials and agents, * * * were acting under color of a covert federal Army pro-[gram]" (J.A. 7, ¶ 14). The complaint asserted that the alleged conduct of defendants violated plaintiff's "consitutional right to privacy * * * implicit in the First, Third, Fourth and Ninth Amendments * * * [and] implicit in the concept of liberty within the Fifth Amendment Due Process Clause, and generally within the 'penumbras' of the Bill[] of Rights" (J.A. 8, ¶ 17). Plaintiff also named as defendants the Board of Regents of the University of Maryland and several physicians who were employees of the University of Maryland, alleging that these state defendants participated in the testing program pursuant to "an agreement or contract" with "federal agencies" (J.A. 9, ¶ 20). Plaintiff thus asserted claims under 42 U.S.C. 1983 (Count II) and 42 U.S.C. 1985 (Count III) (J.A. 8-10).

prior refusal to dismiss the *Bivens* claims in light of this Court's decision in *Chappell*, but concluded that *Chappell* was "not controlling" because "plaintiff in the instant case did not participate in the Army's testing program because a superior officer ordered him to do so; instead * * * he volunteered" and "could have freely withdrawn" (Pet. App. 33a-34a). The district court thereafter certified this order for interlocutory appeal under 28 U.S.C. 1292(b) (J.A. 11-12), and the court of appeals accepted the appeal (*id.* at 13-15).

3. a. The court of appeals affirmed the district court's refusal to dismiss plaintiff's *Bivens* claims, holding that a case-by-case analysis was necessary under *Chappell* to determine whether the particular suit would undermine military discipline. Noting plaintiff's allegation that he had not been told that he was ingesting LSD, the court reasoned that "Stanley could not possibly have challenged his 'orders' to drink the clear substance" (Pet. App. 12a). Therefore, the court concluded, " '[t]he inescapable demands of military discipline and obedience to orders' are not implicated by the facts of this case" (*ibid.*, quoting *Chappell*, 462 U.S. at 300).

The court of appeals also found absent the other special factor, "Congress's plenary authority over the military and its extensive activity in the field" (Pet. App. 12a). This factor was absent, the court ruled, because the "intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* are clearly inadequate to compensate Stanley for the violations complained of here," since Stanley did not have available to him "the remedies provided under article 138 of the Uniform Code of Military Justice" (*id.* at 12a-13a). The court did not address peti-

tioners' argument that the Veterans' Benefits Act constituted Congress's "activity in the field" and thus had to be considered under the "special factors" analysis of *Chappell*.

Having found that the "special factors" of *Chappell* were absent, the court also ruled that plaintiff's suit was not precluded by the remedial scheme afforded by the Veterans Benefits Act, 38 U.S.C. 301 *et seq.*, under the "adequate alternative remedy" analysis of *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980). Reasoning that the Act would not adequately compensate plaintiff, the court of appeals concluded that the Act was not the exclusive remedy for servicemen "injured while acting incident to military service" (Pet. App. 15a).

b. Acting sua sponte, the court of appeals went on to consider plaintiff's FTCA claims against the United States. Ignoring plaintiff's failure to appeal from the district court's 1982 Rule 54(b) final judgment dismissing these claims, the absence of the United States as a party on the appeal, and the lack of any briefing on the issue, the court overruled both the district court's final judgment and the Fifth Circuit's 1981 decision dismissing the FTCA claims in the previous complaint. It reinstated the FTCA claims against the United States.

The court acknowledged that the Fifth Circuit's decision was the "law of the case," but reasoned that such a decision need not be followed "when controlling authority has since made a contrary decision of the law applicable to the issue" (Pet. App. 17a). The court held that this "controlling authority" was provided by *Johnson* v. *United States*, 779 F.2d 1492 (11th Cir. 1986) (en banc), cert. granted, No. 85-2039 (Oct. 6, 1986), and *Cole* v. *United States*, 755

F.2d 873 (11th Cir. 1985). Relying also on *United States* v. *Shearer*, No. 84-194 (June 27, 1985), the court held that "under *Johnson*, *Cole*, and *S[illegible]er*, this case requires the case-by-case analysis to determine whether the purpose of the *Feres* doctrine would be served by precluding Stanley's FTCA claim against the government" (Pet. App. 19a). The court concluded that military discipline and effectiveness might not be undermined by permitting plaintiff to go forward with his FTCA claims, so that they are not "necessarily barred by the *Feres* doctrine" (*id.* at 20a). The court remanded the case with instructions to allow Stanley to amend his complaint "to plead consistent with recent precedent" (*ibid.*).

SUMMARY OF ARGUMENT

The court of appeals egregiously violated basic rules of appellate jurisdiction by reaching plaintiff's FTCA claims. The district court entered a final judgment pursuant to Fed. R. Civ. P. 54(b) dismissing those claims in 1982, and plaintiff never appealed that dismissal. Since his time to appeal expired in January 1983, the court of appeals lacked jurisdiction over the FTCA claims. Moreover, the court's jurisdiction was based on the district court's certification of the separate *Bivens* issue for interlocutory review pursuant to 28 U.S.C. 1292(b). Even if the time for appealing the dismissal of the FTCA claims had not expired, the court of appeals lacked jurisdiction to reach the FTCA claims while deciding the interlocutory appeal on the *Bivens* claims. The extent of the court of appeals' error is demonstrated by the fact that no FTCA question had been briefed or argued, and, indeed, the United States did not participate in the appeal.

In any event, the court of appeals erred in concluding that the FTCA claims were not necessarily barred. This Court recently reiterated that a service member may not recover "for injuries which 'arise out of or are in the course of activity incident to service.'" *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 5, quoting *Feres* v. *United States*, 340 U.S. 135, 146 (1950). There is no real question that plaintiff's injuries were incurred incident to service, as the Fifth Circuit held in 1981, so plaintiff's FTCA claims are barred by the *Feres* doctrine for that reason. The court of appeals read *Shearer* as authorizing a case-by-case inquiry to determine whether military discipline and effectiveness would be undermined by permitting a plaintiff to go forward with an FTCA claim, even when the injury occurred incident to military service. To the contrary, *Shearer* makes clear that claims based on injuries incurred incident to military service are the type of claims that are barred by the *Feres* doctrine because they would almost inevitably call for second-guessing of military decisions by the civilian courts, to the detriment of military discipline and effectiveness. Moreover, there is no doubt that permitting plaintiff to go forward with his claim would involve the judiciary in sensitive military matters, since a central issue in plaintiff's case would be whether the Army erred by administering LSD to volunteers in the 1950s.

The court of appeals extended its incorrect application of the *Feres* doctrine in refusing to follow the clear and unequivocal statement of this Court's holding in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), that service members are barred from bringing *Bivens*

claims against their superior officers. Instead, the court of appeals employed a case-by-case analysis, as it did in resurrecting plaintiff's FTCA claims. In so doing the court simply misread *Chappell*. The Court clearly held in that case that service members may not pursue *Bivens* actions against their superior officers, although it suggested that injunctive relief may be available in some cases.

Moreover, the two "special factors" identified in *Chappell*—the "unique disciplinary structure of the Military Establishment and Congress' activity in the field" (462 U.S. at 304)—mandate the conclusion that plaintiff is barred from pursuing his *Bivens* claims. In applying these factors, the court in this case accorded an extremely limited regard for the first factor by holding, in essence, that the only inquiry the court need make is whether the suit involves a challenge to a military order given to the plaintiff. However, the "unique disciplinary structure" of the military identified in *Chappell* is not so limited, but instead precludes military personnel from bringing claims that require civilian courts to second-guess military decisions. In applying the second special factor, the court of appeals limited *Chappell* to cases where the Code of Military Justice provided an alternative remedy, refusing even to acknowledge the Veterans Benefits Act as congressional "activity in the field." This Court's holding cannot reasonably be so limited.

ARGUMENT

I. THE COURT OF APPEALS LACKED JURISDICTION OVER PLAINTIFF'S FTCA CLAIMS

The court of appeals lacked jurisdiction over plaintiff's FTCA claims. In the absence of a timely appeal, there is no basis for review by the court of appeals of the district court's 1982 final judgment dismissing those claims. That is especially so where, as here, the court's jurisdiction was based on its action, taken pursuant to 28 U.S.C. 1292(b), to review the altogether separate *Bivens* issue certified by the district court.

Fed. R. Civ. P. 54(b) provides for the separate entry of final judgment "when more than one claim for relief is presented in an action * * * or when multiple parties are involved." The FTCA claims against the United States are plainly separate from the *Bivens* claims against the individual defendants, just as the United States is a party separate from the individual defendants. As required by Rule 54(b), the district court determined that there was "no just reason for delay" and expressly directed the clerk to "enter final judgment in favor of the United States" on November 9, 1982 (Pet. App. 55a). In accordance with Fed. R. Civ. P. 79(a), the clerk entered this order onto the docket the next day (J.A. 2).

A central purpose of Rule 54(b) certification is to establish a definite starting point for appellate proceedings. See *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 8 (1980); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435-436 (1956). Accordingly, the lower courts have uniformly held that a judgment entered under Rule 54(b) must be ap-

pealed within the time permitted by Fed. R. App. P. 4, which in this case was 60 days. See, *e.g.*, *Federal Deposit Insurance Corp.* v. *Tripati*, 769 F.2d 507, 508 (8th Cir. 1985); *Exchange National Bank* v. *Daniels*, 763 F.2d 286, 291-292 (7th Cir. 1985); *Smith* v. *Mine Safety Appliances Co.*, 691 F.2d 724, 725 (5th Cir. 1982); see generally 6 J. Moore, *Moore's Federal Practice* ¶ 54.28[3.-3], at 54-155 (2d ed. 1986).[5] Since plaintiff did not appeal by January 1983, he forfeited any right to appeal the dismissal of his FTCA claims at that time.[6]

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[5] Unless a party against whom final judgment is entered is required to prosecute an immediate appeal upon pain of forfeiture, the prevailing party who has obtained a final judgment under Rule 54(b) would never know whether that judgment was in fact final until after all claims against all parties had been adjudicated and a final judgment entered under Fed. R. Civ. P. 58. Faced with such a possibility, a party would have no choice but to continue its participation in the litigation so as to remain apprised of its course and to protect any rights it may be in a position to assert. See, *e.g.*, *Scholl* v. *District of Columbia*, 331 F.2d 1018, 1020 (D.C. Cir. 1964); *Exchange National Bank*, 763 F.2d 286, 292 (7th Cir. 1985). In addition, allowing a party the option of a later appeal from a Rule 54(b) judgment would also interfere with the discretion of the district court to enter certification in the " 'interest of sound judicial administration.' " *Curtiss-Wright*, 446 U.S. at 8, quoting *Sears, Roebuck*, 351 U.S. at 437. By entering certification, the district court can elicit a final appellate resolution of a claim which may have overriding or controlling impact on some aspects of the case before it. Allowing a party (or, as here, a court of appeals) to ignore the absence of an appeal from such a certified order erodes the district court's ability to manage the cases on its docket.

[6] Plaintiff contends (Br. in Opp. 4, 10) that the order of November 9, 1982, and the clerk's entry of November 10, 1982, were deficient. He describes the order as "not self executing" because it provides that "the clerk shall enter final

Although it acknowledged that final judgment had been entered on these FTCA claims in 1982 (Pet. App. 5a), the court of appeals apparently felt that it was free to ignore the absence of a timely notice of appeal from this final judgment. That conclusion is wrong. With the single exception of appeals conducted under 28 U.S.C. 1292(b),[7] all appeals require that a notice of appeal be filed in accordance with Fed. R. App. P. 4. As this Court has noted, "[i]t is well settled that the requirement of a timely notice of appeal is '"mandatory and jurisdictional."'" *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982), quoting *Browder* v. *Director, Illinois*

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judgment in favor of the United States"; plaintiff apparently contends that the order should have read "final judgment is entered in favor of the United States." Plaintiff apparently considers the clerk's entry in the docket deficient for the same reason. There is no substance to this hyper-technical argument. Both the order and the entry in the docket clearly provided that partial final judgment had been entered in favor of the United States (see Pet. App. 55a; J.A. 2). Moreover, respondent understood that the court had dismissed the United States. In a letter to the district court on June 21, 1983, respondent's counsel stated that "[l]ast October you wrote a detailed order * * * wherein you dismissed the Plaintiff's FTCA claim against the U.S. Government due to the *Feres* doctrine" (Pet. Reply Memo App. 2a). The court of appeals also understood that the FTCA claims had been dismissed. It noted that "[u]pon motion by the government, on November 9, 1982, the district court entered final judgment in favor of the government" (Pet. App. 5a).

[7] In the case of appeals conducted under Section 1292(b), the function of a notice of appeal is served by the requirement that the party file a petition for permission to appeal within the 10 days mandated by Fed. R. App. P. 5. Rule 5(d) provides that a notice of appeal need not be filed after permission has been granted.

Dep't of Corrections, 434 U.S. 257, 264 (1978); 28 U.S.C. 2107. No notice of appeal whatsoever has been filed from the November 9, 1982, final judgment. Thus, in reaching the merits of plaintiffs' FTCA claims, the court of appeals has simply done away with a prerequisite to its jurisdiction. There is no conceivable justification for the court of appeals' action.

The court's assumption of jurisdiction over the FTCA issue is remarkable in another sense. Here, the court's appellate jurisdiction was not based on 28 U.S.C. 1291 to review an otherwise final judgment into which all prior, non-final orders had been merged under Rule 54. Rather, this was a permissive interlocutory appeal under 28 U.S.C. 1292(b) based on the district court's certification of the *Bivens* question for appellate review (see J.A. 11-15). It is well established that on such an interlocutory appeal, "the scope of the issues open to the court of appeals is closely limited to the order appealed from" and does not extend to "matters ruled upon in other orders." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* 143 (1977); see also *Pritchard-Keang Nam Corp* v. *Jaworski*, 751 F.2d 277, 280-281 n.3 (8th Cir. 1984), cert. dismissed, 472 U.S. 1022 (1985); *United States* v. *Bear Marine Services*, 696 F.2d 1117, 1118-1119 n.1 (5th Cir. 1983). Under this test, there can be no doubt that the court of appeals' jurisdiction over the *Bivens* order certified by the district court could not extend to the district court's final order dismissing the FTCA claims in 1982.

In short, the jurisdiction of the court of appeals in this case was predicated on Section 1292(b) to review the *Bivens* issue that was altogether separate

from respondent's previously dismissed FTCA claim. It was on this basis that the parties briefed and argued the case. The United States, because it had been dismissed as a party, did not participate in the proceedings in the Eleventh Circuit.[8] There was no briefing or argument on the FTCA claims, which the parties assumed had been disposed of in 1982. Yet, notwithstanding the limited posture of the appeal, and without any warning, the court resurrected the FTCA claims against the United States. This action, which deprived the United States of its basic right to be heard, flagrantly violated the rules governing appellate jurisdiction.[9]

II. PLAINTIFF'S FTCA CLAIMS AND *BIVENS* CLAIMS ARE BARRED BECAUSE THEY ARE THE TYPES OF CLAIMS THAT UNDERMINE MILITARY DISCIPLINE AND EFFECTIVENESS

The *Feres* doctrine bars FTCA claims for injuries received by service members which " 'arise out of or are in the course of activity incident to service.' "

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[8] Indeed, the United States is not named as a defendant in plaintiff's Second Amended Complaint (J.A. 3), which contains no FTCA claim.

[9] Plaintiff asserts (Br. in Opp. 11) that he would be able to obtain relief under Fed. R. Civ. P. 60(b), which provides for relief from final judgments in certain circumstances. However, we know of no authority authorizing a court of appeals to reopen a final judgment more than three years after it was entered because (as the court of appeals incorrectly concluded (Pet. App. 17a)) controlling authority had changed in the interim. Moreover, such a rule would obviously prevent parties from ever knowing with any certainty that a case had been resolved. Such a holding would also completely bypass the district court and its role in adjudicating Rule 60(b) motions.

United States v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 4-5, quoting *Feres* v. *United States*, 340 U.S. 135, 146 (1950). In *Chappell* v. *Wallace*, 462 U.S. 296, 305 (1983) (footnote omitted), this Court found the *Feres* doctrine enlightening in holding that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." Relying primarily on its prior decision in *Johnson* v. *United States*, 779 F.2d 1492 (11th Cir. 1986) (en banc), cert. granted, No. 85-2039 (Oct. 6, 1986), the court of appeals in this case ignored these controlling principles and permitted plaintiff to go forward with FTCA claims and *Bivens* claims even though plaintiff's alleged injuries arose out of his military service. While the court committed other errors as well (particularly by reaching the FTCA issue, which was not before it), one fundamental error underlies the court's decision in this case. The court failed to understand that damage actions by military personnel based on injuries incurred incident to military service are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer*, slip op. 6-7 (emphasis in original)). Accordingly, such claims, whether brought as FTCA claims or as *Bivens* claims, are barred.

A. The Court Of Appeals Erred By Holding That Plaintiff's FTCA Claims Are Not Necessarily Barred By The *Feres* Doctrine

The court of appeals' lack of jurisdiction to decide the FTCA claims effectively obviates the need for this Court to consider whether the court erred in concluding that they are not necessarily barred by the *Feres* doctrine. However, it is clear that plaintiff's

FTCA claims are barred. As we explained in our brief in *Johnson*,[10] under the *Feres* doctrine a service member "may not recover under the Federal Torts Claims Act for injuries which 'arise out of or are in the course of activity incident to service.'" *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 4-5, quoting *Feres*, 340 U.S. at 146. In this case it is clear that plaintiff's injuries were incurred incident to military service. Plaintiff alleges that he was injured while "on active duty" (J.A. 6, ¶ 11) participating in a "covert federal Army pro[gram]" (J.A. 7, ¶ 14) involving the use of Army volunteers at the Aberdeen Proving Grounds in Maryland, an Army base. As the Fifth Circuit held in its prior decision in this case, these facts make plain that "the relationship between Stanley and the allegedly negligent individuals stemmed from their official military relationship" (Pet. App. 76a). It properly held that plaintiff's claims are barred because his alleged injuries were incurred incident to military service. Moreover, even under a case-by-case approach, plaintiff's effort to challenge in civilian courts military decisions which affected him solely because he was a member of the military must be barred in light of its obvious effect on military discipline and effectiveness.

1. The court of appeals did not take issue with the Fifth Circuit's conclusion that Stanley was injured incident to his military service. Rather, relying on the decision in *Johnson* v. *United States*, 749 F.2d 1530 (11th Cir. 1985), reinstated, 779 F.2d 1492 (11th Cir. 1986) (en banc), the court held that the Fifth Circuit had erred in failing to "proceed to the

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[10] We have sent a copy of our brief in *Johnson* to counsel for respondent.

next level of inquiry to determine whether the considerations underlying the *Feres* doctrine militated against permitting Stanley to bring the FTCA claim" (Pet. App. 17a). While our petition and brief in that case make clear our view that *Johnson* was wrongly decided, the court of appeals has far extended *Johnson* in this case. In *Johnson* the court held that a case-by-case inquiry was required only in those cases which fall outside of "the typical *Feres* factual paradigm—an FTCA suit for injuries or death allegedly caused by the negligence of a serviceman or an employee of the armed services" (749 F.2d at 1537). That "factual paradigm" is obviously present in this case since Stanley alleges that his injuries were caused by Army officers and other employees (or contractors) of the Army. Thus, in extending *Johnson* to the facts of this case, the court of appeals has simply abandoned any restriction on a case-by-case application of the *Feres* doctrine.

As in *Johnson*, the court of appeals justified its approach (Pet. App. 19a) as mandated by this Court's statement in *Shearer* that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases" (*Shearer*, slip op. 5). The court misread *Shearer*. The statement in *Shearer* on which the court relied was made in the context of rejecting the clear rule applied by the Third Circuit in that case that the *Feres* doctrine did not bar an FTCA suit where the plaintiff's decedent was off-duty and off-base when killed by his fellow servicemen (see 723 F.2d 1102, 1106 (1983)). The Court in *Shearer* did not reject the well-settled rule that claims based on injuries incurred incident to military service are barred. Indeed, the Court reiterated the principle first enunci-

ated in *Feres* that service members may not recover "for injuries which 'arise out of or are in the course of activity incident to service' " (*Shearer*, slip op. 5, quoting *Feres*, 340 U.S. at 146).

Furthermore, the Court's analysis in *Shearer* is fundamentally inconsistent with the case-by-case approach adopted by the Eleventh Circuit in this case and in *Johnson*. In *Shearer* this Court rejected the plaintiff's argument that she could bring suit alleging that the Army had been negligent in failing to exercise better control over the activities of the servicemen who had killed the plaintiff's decedent, reasoning that such a suit "goes directly to the 'management' of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman" (slip op. 6 (footnote omitted)). As the Court explained, such a suit would necessarily "mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions" (*ibid.*). Such decisions, the Court reasoned, are "decisions of command," and suits attacking such decisions are "the *type* of claims, that if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (slip op. 6-7 (emphasis in original)).

The lesson of *Shearer* is that claims based on injuries incurred incident to service (as determined by assessing all relevant circumstances including but not limited to whether the service member was on duty or on a military base at the time of the injury) are barred by the *Feres* doctrine, and that other claims are barred as well if they are of a type that will lead to the impairment of military discipline and

effectiveness. The Court made clear that claims based on injuries incurred incident to service are barred by so stating (slip op. 5) and by explaining (*id.* at 6-7) that the claims involved in *Feres* (which included two medical malpractice claims) are the types of claims that will necessarily involve the courts in sensitive military affairs. The Court did not authorize a case-by-case inquiry into whether particular claims will undermine military discipline and effectiveness where it is clear that the injury occurred incident to service.

2. Moreover, even under a case-by-case approach it is clear that plaintiff's claim is barred. Here, as in *Shearer*, plaintiff is challenging "decisions of command," *i.e.*, decisions concerning whether and how to use him as an Army volunteer in conducting chemical warfare experiments in the late 1950s. The courts below erred by focusing exclusively on the fact that the questioned action did not involve an "order" which respondent could, at the time, have challenged or disobeyed. The *Feres* doctrine encompasses far more than simply those cases in which an order directed to the plaintiff would be at issue. Indeed, in *Feres* the plaintiffs' claims arose from negligent medical treatment and the operation of a defective heating plant that led to a barracks fire, and did not involve any challenge to any particular order. Nor did *Shearer* involve any particular order.

By focusing on whether a particular order was at issue, the court ignored the basic thrust of the *Feres* doctrine, which is that members of the military should not be able to challenge military decisions in civilian courts. *United States* v. *Muniz*, 374 U.S. 150, 162 (1963); *United States* v. *Brown*, 348 U.S. 110, 112 (1954). As noted in *Chappell* and reiterated

in *Shearer*, " 'complex, subtle, and professional decisions as to the composition, training, * * * and control of a military force are essentially professional military judgments' " (*Shearer*, slip op. 6, quoting *Chappell*, 462 U.S. at 302). What matters is "whether the suit requires the civilian court to second-guess military decisions" or "might impair essential military discipline." (*Shearer*, slip op. 5). As stressed in *Chappell*, " 'courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have' " (462 U.S. at 305, quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962)).[11]

Plainly, plaintiff's suit will necessarily involve second-guessing of military decisions concerning the use of Army personnel. If it can go forward, there is no apparent basis for barring many other present or former soldiers from going to court to challenge the manner of their treatment by military superiors. Many military decisions are difficult precisely because they involve exposing people to significant risks of harm. Inquiry into them will, as here, embroil civilian courts in the reassessment of sensitive military decisions. Accordingly, plaintiff's claims must be barred by the *Feres* doctrine, even under the case-by-case approach.

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[11] However, the Court in *Chappell*, citing cases where injunctive relief was granted at the behest of a member of the military, noted that military personnel are not "barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." 462 U.S. at 304-305; see pages 24-26, *infra*.

B. The Court Of Appeals Erred By Holding That Plaintiff's *Bivens* Claims Are Not Barred By *Chappell*

The court of appeals compounded its erroneous application of *Feres* by holding that *Chappell* does not necessarily bar plaintiff's *Bivens* claims. This ruling flies in the face of this Court's unequivocal statement of its holding in *Chappell*: "We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (462 U.S. at 305 (footnote omitted)). This statement makes plain that no case-by-case analysis as to whether military discipline would be undermined by a particular suit is warranted. Moreover, even assuming that a case-by-case inquiry is warranted, it is clear that the same special factors that led the Court in *Chappell* to conclude that the plaintiff in that case could not bring a *Bivens* suit compel the conclusion that plaintiff may not pursue his *Bivens* claims.

1. Other than the courts below, every court that has considered the question has concluded that *Chappell*'s bar to damage suits against military superiors means exactly what it appears to mean, which is that enlisted military personnel may not bring *Bivens* suits, and that no case-by-case inquiry is required to determine whether a particular suit is barred.[12] In

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[12] Even counsel for plaintiff believed at one point in this litigation that *Chappell* barred plaintiff's *Bivens* claims. He stated, in a letter to the district court shortly after the decision in *Chappell*, that "we are ethically compelled to cite to the court a recent Supreme Court decision which, we regret to say, is apparently dispositive of this case" (Pet. Reply Memo App. 1a). Counsel went on to say that the Court in *Chappell* "held that the same principles which underly [*sic*] the *Feres* doctrine and which require absolute immunity

Mollnow v. *Carlton*, 716 F.2d 627, 630 (1983), cert. denied, 465 U.S. 1100 (1984), the Ninth Circuit ruled that "[b]y rejecting this court's consideration of such 'reviewability factors' as the adequacy of the intraservice remedy, we believe that the [*Chappell*] Court necessarily imposed a *per se* prohibition on the filing of *Bivens*-type actions by servicemen against their superiors." Or, as succinctly stated by the Fourth Circuit, the rule established by *Chappell* is that "a *Bivens*-type claim * * * is barred by the intramilitary immunity." *Trerice* v. *Summons*, 755 F.2d 1081, 1084 (1985). As the Fifth Circuit reasoned in *Gaspard* v. *United States*, 713 F.2d 1097, 1103 (1983), cert. denied, 466 U.S. 975 (1984), "[t]he need for plenary discretion in military affairs and the existence of an adequate, congressionally imposed compensation scheme instruct us to avoid either imposing *or inquiring into* monetary damages when a service person is injured" (emphasis in original).

In *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 107 (1986), the Third Circuit considered the decision below and concluded that "the *Stanley* court misread *Chappell*." [13] The court in *Jorden* construed *Chappell* as "laying down a general rule barring damages actions by military personnel against superior officers for constitutional violations, rather than authorizing a factual inquiry" (*id.* at 108). As

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from an FTCA action also require immunity from a *Bivens* constitutional action against federal officers" (*id.* at 2a).

[13] While decided before *Chappell*, the Third Circuit in *Jaffee* v. *United States*, 663 F.2d 1226 (1981) (en banc), cert. denied, 456 U.S. 972 (1982), anticipated the reasoning of *Chappell* exactly, holding that *Feres* principles precluded any *Bivens* cause of action under the "special factors" analysis employed by this Court in *Chappell* (663 F.2d at 1236-1237).

the court further explained, "[t]he *Stanley* court's approach would frequently require courts to make difficult and hair-splitting distinctions as to whether a particular claim was the sort that, if legally actionable, would threaten military discipline." (*id.* at 107-108).[14]

Ignoring entirely this Court's statement of its holding, the court of appeals below focused instead on the observation in *Chappell* that "'[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service'" (Pet. App. 11a, quoting 462 U.S. at 304). Viewing this statement as a rejection of any per se rule disallowing *Bivens* suits, the court of appeals reasoned that *Chappell* permits a case-by-case determination as to whether the "special factors" present in *Chappell* are in fact present in this case (Pet. App. 12a-13a).[15]

The court of appeals obviously misunderstood the Court's statement that military personnel are not

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[14] The district courts other than the court below have also been unanimous in reading *Chappell* as an absolute bar to *Bivens* claims by enlisted personnel against their superior officers. See *Alvarez* v. *Wilson*, 600 F. Supp. 706 (N.D. Ill. 1985); *Benvenuti* v. *Dep't of Defense*, 587 F. Supp. 348 (D.D.C. 1984); *Hampton* v. *United States*, 575 F. Supp. 1180 (W.D. Ark. 1983); *Bishop* v. *United States*, 574 F. Supp. 66 (D.D.C. 1983).

[15] The district court acknowledged the existence of the Court's "sweeping concluding statement" in *Chappell*, but, relying on the Court's additional statement that military personnel are not barred from obtaining any redress in the civilian courts, concluded that "[t]he obvious import of the Court's qualified holding is to limit the *Chappell* decision to its facts" (Pet. App. 29a).

barred entirely from obtaining judicial redress. After making that statement, the Court cited three cases—*Brown* v. *Glines*, 444 U.S. 348 (1980), *Parker* v. *Levy*, 417 U.S. 733 (1974), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973)—in none of which was a service member seeking damages. Instead, *Brown* and *Frontiero* involved claims for injunctive relief and *Parker* was a habeas corpus case. The other courts of appeals that have considered *Bivens* claims after *Chappell* have all understood the Court's statement as preserving some rights to relief other than damages (*Jorden*, 799 F.2d at 107; *Gaspard*, 713 F.2d at 1103 n.12; *Trerice*, 755 F.2d at 1083; and *Mollnow*, 716 F.2d at 629 n.4),[16] while barring claims for damages.[17] The courts below erred by

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[16] Of course, claims for relief other than damages can also entail excessive interference by the judiciary in military affairs, and must be barred in some circumstances. See *Gilligan* v. *Morgan*, 413 U.S. 1 (1973); *Mindes* v. *Seaman*, 453 F.2d 197, 201 (5th Cir. 1971); *Dillard* v. *Brown*, 652 F.2d 316, 322 (1981).

[17] Although the Court reserved the question in *Chappell*, noting that it "was not adequately addressed either by the Court of Appeals or in the briefs and oral argument before this Court" (462 U.S. at 305 n.3), the courts of appeals have uniformly held that the reasoning of *Chappell* precludes suits by enlisted personnel under the various civil rights statutes. See, *e.g.*, *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 104-107 (3d Cir. 1986); *Brown* v. *United States*, 739 F.2d 362, 366-367 (8th Cir. 1984), cert. denied, No. 84-636 (July 1, 1985); *Martelon* v. *Temple*, 747 F.2d 1348, 1350-1351 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). While the court of appeals in this case declined to reach this issue (Pet. App. 20a); we agree with the state defendants (86-443 Pet. 16-19) that it makes little sense to preclude FTCA claims against the United States and *Bivens* suits against individuals under the *Feres* doctrine, but to permit

failing to understand that this Court flatly barred service members from seeking damages while preserving their right to obtain other sorts of relief in some cases.[18]

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suits by enlisted personnel challenging the same conduct under the civil rights statutes. That is especially true where, as here, the state defendants are alleged to be cooperating with the federal government in an official Army program (see J.A. 7, ¶ 14). While plaintiff claims (Br. in Opp. 6) that it is not clear exactly what role the state defendants played, it is absolutely clear that the LSD testing program at issue was an official Army program. See S. Rep. 94-755, 94th Cong., 2d Sess. 392, 411-412 (1976).

[18] Claims for personal liability in damages pose an especially grave threat to military discipline and effectiveness. *Jorden*, 799 F.2d at 110. As this Court has repeatedly recognized, the threat of personal liability can substantially inhibit officials in the performance of their duties. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Butz* v. *Economou*, 438 U.S. 478 (1978); *Barr* v. *Matteo*, 360 U.S. 564 (1959). Such inhibition, which should be avoided where possible in the civilian context, is particularly dysfunctional in the military context where national survival in war may depend on unquestioning obedience to military orders. See *Chappell*, 462 U.S. at 304 (noting "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel"); *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 3 (" '[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life,' " quoting *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975)). Accordingly, as the Court held in *Chappell*, military personnel should be barred from pursuing *Bivens* actions. Thus, it is important that the bar to *Bivens* actions be a total bar. If the question whether superior officers are susceptible to damage actions depends on the balancing of various factors by civilian courts, then the behavior of those officers may be affected regardless of how a court would ultimately resolve the question.

2. Even if this Court had not plainly held in *Chappell* that military personnel are barred from bringing *Bivens* claims seeking damages from their superiors, the court of appeals clearly erred in its application of the two special factors that this Court identified in *Chappell* to the facts of this case. Because military discipline and effectiveness would be undermined by permitting plaintiff's *Bivens* action to go forward, and because Congress has provided in the Veterans' Benefits Act that service members injured incident to military service can obtain recovery, it would be inappropriate to authorize plaintiff to bring a *Bivens* action even if the matter were open to question. Reversal of the court of appeals' holding that plaintiff may pursue his *Bivens* claim is therefore appropriate on this independent ground.

a. The court of appeals reasoned that the first "special factor" identified in *Chappell*, the "unique disciplinary structure of the Military Establishment" (462 U.S. at 304), was not present in this case because Stanley was a volunteer in the chemical warfare experiments and thus "was not subject to direct military orders" (Pet. App. 12a). The court of appeals found "[m]ost important" the fact that Stanley "was surreptitiously administered the drug" and thus "could not possibly have challenged his 'orders' to drink the clear substance" (*ibid.*). As explained above (pages 20-21), the court of appeals' exclusive focus on whether the plaintiff could have disobeyed his order is a far too niggardly construction of this special factor, which "seems [to] best explain[]" this Court's decision in *Feres* (*Chappell*, 462 U.S. at 299). What matters is not whether a particular order is at issue, but whether "the trial would * * * involve second-guessing military orders" or "require

members of the Armed Services to testify in court as to each other's decisions and actions" in a case involving injury to a service member. *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977); see also *Shearer*, slip op. 5.

In this case, Stanley alleges that he was given LSD as part of an official Army chemical warfare program (J.A. 7, ¶ 14). Plaintiff's suit thus necessarily constitutes a direct attack on the Army's decision to conduct these experiments as well as its decision to use volunteers. As in *Shearer*, plaintiff's suit in this case "goes directly to the 'management' of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman" (slip op. 6). Whatever the wisdom of the decision to conduct these experiments in 1958,[19] the *Feres* doctrine as applied in *Chappell* makes clear that it is not the task of the judiciary to second-guess such decisions through damage actions by enlisted men against their superior officers. See *Goldman*, slip op. 4.[20]

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[19] While LSD is now known to be a dangerous drug, it should be noted that the state of knowledge concerning its effects was far less complete in the late 1950s when the Army's experiments were conducted. See H. R. Rep. 815, 86th Cong., 1st Sess. 9-10 (1959) (noting that "psychochemicals" were "almost completely unknown" as recently as "[f]ive or six years ago"). It was then thought that the incapacitating effects of psychochemicals were only "temporary" and thus that they were ideal for use in the situation "where military necessity requires control of a situation, but where there is good reason for not harming either the surrounding population or even the intended target troops" (*id.* at 10-11).

[20] Plaintiff suggests (Br. in Opp. 15) that this case is distinguishable from *Chappell* because the alleged tortfeasors

b. The court of appeals also erred in its analysis of the second special factor identified in *Chappell*. In *Chappell*, the Court noted that Congress had enacted the Code of Military Justice—"a comprehensive internal system of justice to regulate military life" (462 U.S. at 302). This "activity in the field" by Congress, the Court reasoned, constituted a second special factor precluding a *Bivens* remedy, even though the Code of Military Justice did not permit any recovery of damages (462 U.S. at 304). The court of appeals simply ignored this reasoning, finding that "[t]hose intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* are clearly inadequate to compensate Stanley for the violations complained of here" because "Article 138 [of the Code of Military Justice] is not available to veterans" (Pet. App. 12a-13a).

This reasoning misses the point that the special factor identified in *Chappell* was "Congress' activity in the field," not the presence of an adequate alternative remedy to a *Bivens* action,[21] and certainly not the

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are not his "superior officers." There is no merit to this distinction. Plaintiff's claim is clearly based on decisions made by military personnel superior to him, so he is challenging decisions of superior officers.

[21] In *Carlson* v. *Green*, 446 U.S. 14, 18-23 (1980), the Court determined that a *Bivens* suit on behalf of a federal prisoner was not precluded in circumstances where the FTCA provided an alternative, but not a fully adequate alternative remedy, and no other "special factors" counselled hesitation. In *Chappell* the Court noted that two special factors counselled hesitation, the *Feres* doctrine and the existence of an alternative remedy, even though the alternative remedy available in *Chappell* was not fully adequate under the standards set out in *Carlson*, since it did not provide compensatory damages,

applicability of the Article 138 of the Code of Military Justice. In this case, the Congressional activity in the field is the Veterans Benefits Act, which provides compensation and medical care to servicemen injured in the line of duty.[22] The court of appeals

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much less punitive damages, or authorize a jury trial (compare 462 U.S. at 303-304 with 446 U.S. at 21-23). Thus, it seems clear under *Carlson* that the existence of an alternative remedy that is not fully adequate will not by itself generally lead to the conclusion that a *Bivens* action is precluded. Howver, it is also clear under *Chappell* that the existence of an alternative remedy is a special factor showing congressional "activity in the field" that weighs against the recognition of a *Bivens* action. Together with other special factors, the existence of an alternative remedy that is not fully adequate must be considered to determine whether a *Bivens* action is precluded.

[22] Respondent complains (Br. in Opp. 21) that he has not obtained benefits under the Veterans' Benefits Act, and suggests (*id.* at 19 n.9) that we concede that the Act does not provide him with a remedy. These statements demonstrate misunderstanding of the Act and our position. Respondent does not allege that he applied for veterans' disability benefits, and we are informed that he has not applied; of course, a person must apply in order to obtain benefits. 38 U.S.C. 3001(a). If respondent demonstrates that he suffers from a disability as a result of his ingestion of LSD in 1958, as he appears to suggest (J.A. 8, ¶ 18), then he is entitled to compensation. 38 U.S.C. 331. But, as *Chappell* makes clear, it is not the adequacy of the remedy, but rather Congress's "activity in the field" (462 U.S. at 304), that constitutes the "special factor" which led this Court to conclude that a *Bivens* remedy is not available to military personnel for torts allegedly committed by their superior officers. Thus, even if the Veterans' Benefits Act does not provide what plaintiff would consider to be a complete remedy (such as damages to compensate him for the dissolution of his marriage), its existence is nevertheless a special factor weighing against the recognition of a *Bivens* remedy.

never considered that Act under the special factors analysis of *Bivens* and *Chappell*.[23] By letting its reasoning turn on the fact that the Code of Military Justice is unavailable to veterans, the court of appeals limited the special factor of Congress's activity in the field to the case where that particular statute provides an adequate form of relief.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[23] The court of appeals did address the Veterans' Benefits Act in the context of rejecting it as an adequate alternative remedy under the analysis of *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980). See Pet. App. 13a-16a & n.4. Contrary to the court of appeals' statement (*id.* at 13a), defendants had never argued that the Act was a fully adequate alternative remedy, but had argued instead that the Act constituted "Congress' activity in the field" under the analysis of *Chappell*. The court of appeals simply ignored this argument.

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No. 86-393

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, et al.,
Petitioners,

vs.

JAMES B. STANLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

In framing the questions presented for review, the Petitioners include matters which are in dispute. For example, it is in dispute whether Plaintiff was on "active duty" status while participating in an "official Army drug experimentation program," and it is in dispute that an appealable partial final judgment was ever entered in favor of the United States. It is also disputed that Plaintiff is suing his "superior officers." We therefore feel constrained to restate the questions presented as follows:

1. Whether the Court of Appeals erred in reopening the law of the case as established in a previous appeal, when controlling authority had changed during the interim.

2. Whether the Court of Appeals erred by finding this Court's decision in *Chappell v. Wallace*, and its rationale, to be distinguishable from the unique facts alleged in the present case.

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No. 86-393

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, et al.,
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vs.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATUTES

The Petitioners have set forth only the statute creating jurisdiction in the United States District Court over FTCA claims. Additional relevant statutes are set forth below.

28 USC §2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 USC §2680 provides in relevant part:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—. . . .

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

STATEMENT

There are some incorrect assertions in the Petitioners' statement, as well as certain alleged "facts" which are completely outside the record. Also, some important facts which make this case unique and set it apart from the usual *Feres* case have been omitted from the Petitioners' statement. We therefore supplement the statement as follows.

The eleventh circuit below mentioned some of the important facts in its opinion. (Pet. App. 2a-3a). The district court judge elaborated further in his most recent opinion. (Pet App. 22a-23a).

The plaintiff did not volunteer to participate in any drug testing. He was not a true "volunteer," nor was he under any orders, nor was he taking advantage of a military privilege, nor was he on his regular duty status at the time in question.

While he was a master sergeant in the U.S. Army, Plaintiff volunteered to participate in a program ostensibly for the testing and development of various gas masks and protective clothing to be used as a defense against chemical warfare attack. There was no compulsion but he was promised that letters of commendation would be put in his file and he was released from his regular duty status for approximately a month. At any time Plaintiff desired he could withdraw from the program and return to his

regular duties. There is no evidence as to his technical duty status during that month.[1]

Plaintiff was deliberately given false information about the program in order to extract his consent to volunteer. The real purpose of the program was to observe Plaintiff's "unwitting reaction" to LSD, which was secretly introduced into his bloodstream on four occasions by being mixed with his drinking water, while he carried out the charade of testing gas masks and clothing. Defendants intentionally withheld the true facts for the next eighteen years since it was an integral part of the program to have unwitting human subjects for experimental drug testing.

When Plaintiff unknowingly ingested this dangerous drug on four occasions in February 1958, he experienced severe reactions including hallucinations, but had no idea what was happening. Hallucinogenic drugs such as LSD were virtually unknown to the public in 1958. Eventually Plaintiff returned to his active duty at Fort Knox, Kentucky, but he continued to have recurrent episodes. He occasionally lapsed into periods of incoherency, sometimes marked by violence, and he had no recall of such events afterwards. On one occasion, he awoke from sleep late

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1. Petitioners argue in their brief (pp. 5, n. 4; 9; 17) that Plaintiff pleaded in his second amended complaint he was on active duty at the time in question and that "there is no real question that plaintiff's injuries were incurred incident to service." If the implication is that plaintiff has always admitted his active duty status during his month at the testing laboratories, then that is not correct. The second amended complaint alleges that plaintiff was released from his regular duties to participate in the program (J.A. 4, ¶3), and that the following month he "returned to active duty." (J.A. 5, ¶5. See also R. 103-104). Plaintiff's position before the fifth circuit in the first appeal in this case was that he had been released from his regular duties and that his claim does not arise from an activity incident to his military service. (Pet. App. 68a, 72a). Although the fifth circuit held that plaintiff's injuries were incurred incident to military service, we have always taken issue with that.

at night and, without reason, violently beat his wife and children later being unable to recall the event.

Plaintiff's inexplicable behavioral changes eventually resulted in the breakdown and dissolution of his marriage and family life. (Pet. App. 22a-23a, n. 2). He was thereafter unable to perform his military duties efficiently and was reduced in rank for inefficiency. At times he would be absent without leave and could not recall his whereabouts when questioned. Before the drug testing he had an unblemished record; he had earned various military honors and intended to pursue a promising military career.

In January of 1969, Plaintiff retired from the army. (R. 72, 104). In December of 1975, he received a letter from the Department of the Army, Walter Reed Army Medical Center, which disclosed for the first time that he had been given LSD during February, 1958. (R. 50). The letter solicited his participation in a follow-up study of the "volunteers" who participated in the 1958 LSD experiments. Plaintiff filed administrative claims with the United States Army, which were denied with the statement that there was no appropriation available to pay such a claim and that if Plaintiff was dissatisfied he should file an action within six months in federal district court. (Pet. App. 70a, n. 5; R. 760-762). It was not suggested to Plaintiff that he should seek veterans benefits. Plaintiff thereafter filed this action in the district court in May, 1978. (Pet. App. 3a).

In the first appeal to the fifth circuit, the appellate court did not affirm an order dismissing the FTCA claims, as Petitioners state. Rather, the fifth circuit vacated a summary judgment on grounds that the district court had no subject matter jurisdiction to enter any judgment in favor of the government and, at most, it could only dismiss the FTCA claim, without prejudice, if the government was immune from suit. (Pet. App. 67a-95a).

Next the Petitioners state that, after remand from the first appeal, the district court entered a partial final judgment in favor of the United States on November 9, 1982, which was never appealed. That is not exactly what happened. The district court entered an interlocutory "order" directing the clerk to enter a partial final judgment in favor of the United States(Pet. App. 54a-55a), however the clerk never entered any final judgment on the civil docket. (See J.A. 2). There was therefore no final judgment from which to appeal, as discussed in more detail *infra*.

The eleventh circuit below, in the second appeal, held that a case-by-case analysis is required under *Chappell*[2] to determine whether a particular *Bivens*[3] suit would undermine military discipline *if* the facts of the case appear to fall outside the typical *Feres*[4] factual paradigm. The Petitioners' brief (at page 6) omits the last half of this statement.[5]

The petitioners repeatedly assert that plaintiff is suing his "superior officers" for constitutional violations, which is prohibited by the *Chappell* decision. That is not correct. In fact, not one of the named defendants is alleged to be (nor has any been shown to be) a superior military officer. The evidence in this case (if Plaintiff is allowed to present it) will show that the individual defendants are civilian personnel. (At least that is true according to our informa-

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2. *Chappell v. Wallace*, 462 U.S. 296 (1983).

3. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

4. *Feres v. United States*, 340 U.S. 135 (1950).

5. As the eleventh circuit also stated in *Cole v. United States*, 755 F.2d 873, 877, n. 11 (11th Cir. 1985), "We do not imply that such a case-by-case analysis is required in all cases."

tion and belief. We have not heard otherwise from any individual defendant.) Some are doctors, others are employed in civilian agencies of the federal government (such as the CIA), and a state university has also been named. Other possible defendants have not yet been discovered and named.

These defendants have different degrees and types of involvement in the 1958 drug experimentation program. Their relationship to each other and to the plaintiff is not yet developed by the record since this case is still at the pleading stage without an answer to the complaint having yet been filed. The record does not show any of the defendants to be "superior officers" in the disciplinary or military context discussed in this court's opinion in *Chappell*.

There is nothing in the record in this case to explain how the LSD testing supposedly related to plaintiff's military service, which is pertinent to the *Feres* and *Chappell* analysis. Because of this omission in the record the Petitioners are now, for the first time in this litigation, citing sources outside the record to explain the nexus between Plaintiff's military service and the use of his mind and body for covert LSD experimentation.

At footnote 1 on pages 2-3 of their brief the Petitioners cite a Congressional report for a statement that the purpose of the LSD experimentation on soldiers was to ascertain how the drug affects their ability to function as soldiers and maintain security. The Petitioners again cite the same report at page 26 of their brief to support their contention that "It is absolutely clear that the LSD testing program at issue was an official Army program." The Petitioners also cite (at p. 28, n. 19) another report, out-

side the record in this case, to show that they only believed the effects of the LSD would be temporary.

We have not been able to verify these non-record facts from available sources. We have been advised by the government printing office they are out of print. Use of such non-record facts in this case cannot be justified as a Brandeis brief technique since it only constitutes a selected Congressional report, in a case that does not involve the reasonableness of legislation, and it is not a "public fact" within the scope of judicial notice. *Muller v. Oregon*, 208 U.S. 412 (1908); *Melong v. Miscronesian Claims Comm'n*, 643 F.2d 10, 12, n. 5 (D.C. Cir. 1980); *Eagle-Picher Ind., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 22, n. 8 (1st Cir. 1982). Moreover, the use of such a non-record report to establish the adjudicative facts of this case is inappropriate because the subject matter (how the LSD testing related to plaintiff's military service) is subject to "reasonable dispute." F.R.Ev. 201 (b). In fact, it conflicts with congressional documents which have been filed by Plaintiff in this case with the district court.

In October of 1978, Plaintiff filed with the district court several documents and reports including a publication entitled, Human Drug Testing by the CIA, 1977, Hearings Before the Subcommittee on Health and Scientific Research of the Committee on Human Resources, S. Doc. No. 1893, 95th Cong., 1st Sess. (Sept. 20-21, 1977). (R. 140).[6]

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6. Some of these documents are also described at R. 73-74, 140, and 141-146. According to R. 140, these exhibits were placed in a separate brown envelope by the district court clerk when the first record on appeal was prepared in 1980. We are advised by the eleventh circuit that the envelope is no longer with the record and cannot be located. The district court clerk's docket sheet indicates these exhibits were sent to the fifth circuit at the time of the first appeal but may not have been re-

(Continued on following page)

According to these Senate committee hearings there is reason to believe the human drug experimentation programs during the late 1950's transcended the involvement of the military and was more than just "an official army program." (Pet. brief at pp. 26, 28).

As summarized in Senator Kennedy's opening statement:

> ". . . individual Americans from all social levels, high and low, were made the unwitting subjects of drug tests; scores of universities were used to further CIA research objectives without their knowledge, thus threatening in a fundamental way their traditional independence and integrity; other Government agencies such as the Bureau of Narcotics, the National Institutes of Health and the Internal Revenue Service, were used to further the programs and mission of the Central Intelligence Agency." *Id.* at 1.

There was testimony and other evidence presented at the hearings showing how the CIA used the military as a conduit for funding LSD testing to outside contractors. *Id.* at 131, 151, 156. The evidence at the hearings included a memorandum of the general counsel of the Department of Defense entitled, "Experimentation Programs Conducted by the Department of Defense that Had CIA Sponsorship or Participation and that Involved the Administration to Human Subjects of Drugs Intended for Mind-Control or Behavior-Modification Purposes." *Id.* at 157. It describes how the Department of Defense participation was limited

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Footnote continued—

turned with the rest of the file when the case was remanded back to the district court in 1981. (See Appendix to this brief). We have one copy of the Human Drug Testing by the CIA, 1977 publication (also now out of print) which can be furnished to the court if it is desired.

in some of the programs "to channeling funds to outside contractors in order that sponsorship of the Central Intelligence Agency be covered." *Id.* It described how the project codified as "MKULTRA" was "planned, directed and controlled by the Central Intelligence Agency" . . . "but which might have had some Department of Defense involvement." *Id.* at 158. The drug testing at Edgewood Arsenal was one of several programs in which there was some military participation. *Id.* at 153.

It was alleged by Plaintiff that there is evidence the CIA was involved in the testing program at Edgewood Arsenal. (R. 142-143). The standard procedure of "MKULTRA" was to covertly administer the program through other federal agencies. (R. 143). In 1973, MKULTRA records were destroyed by CIA personnel acting on the verbal orders of Dr. Sidney Gottleib (program chief for MKULTRA) and Richard Helms, director of the CIA. (R. 143).

Contrary to the alleged military purpose of the drug testing set forth in petitioners' brief, there was evidence at the hearings that the purpose of the MKULTRA project was "to investigate whether and how it was possible to modify an individual's behavior by covert means." *Id.* at 169.[7] The Bureau of Narcotics was also interested in determining whether chemical materials could be used to elicit information from drug informants. *Id.* at 171.

Also, contrary to the assertion that the drug experimentation going on in the late 1950's was confined to being "an official Army program," evidence presented at the hearings revealed that the victims of covert drug experi-

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7. That statement was made by Dr. Sidney Gottlieb, a former CIA agent who is one of the named defendants in this litigation. See also *Id.* at 158.

ments by the CIA were not limited to military servicemen. There was testimony that the CIA experimented with different methods of delivering LSD to unsuspecting civilians. This included sending CIA employed psychologists to bars and taverns to meet and drink with people, and determine if LSD can be surreptitiously delivered by using an aerosol spray. *Id.* at 100.

Finally, Petitioners state several times in their brief that even the Plaintiff's complaint alleges the drug testing program to be an official Army program. (Pet. brief at 28, 17, 5). We disagree. What the complaint alleges is that "the defendants, federal executive department officials and agents, who were *acting under color* of a covert federal army program. . . implemented by the United States government . . ." (J.A. 7, ¶4). The persons involved in the program were acting under the color of what was supposed to be an army program to test gas masks and protective clothing. That is not inconsistent with the allegations that Plaintiff was deceived as to the nature of the experiments, which were implemented by non-military defendants including the Central Intelligence Agency and the University of Maryland.[8] The second amended complaint alleges that the program was carried out by a contract between the University of Maryland and one or more unknown federal agencies. (J.A. 9, ¶20).

Because this case, despite being nine years old, has never passed the pleading stage (no answer having yet been filed by any defendant), there has been virtually no pretrial discovery as to the hierarchy involved in the drug

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8. The second amended complaint names as defendants, in addition to the physicians and the University of Maryland, the former director of the CIA, Richard Helms. The original complaint also named the Central Intelligence Agency and the Department of Defense. (Pet. App. 67a, n. 1).

testing program at Edgewood Arsenal. Plaintiff has had to make due so far with the limited discovery permitted by the district court going solely to the *Feres* issue. (R. 101, 402, 806, 1291-1292, 1334).

SUMMARY OF ARGUMENT

I.

The court of appeals did not lack jurisdiction over the Plaintiff's FTCA claim. No final judgment was entered by the clerk on the civil docket pursuant to the court's Rule 54 (b) order directing the clerk to enter it. A separate appealable judgment was not entered by the clerk pursuant to the rules of civil and appellate procedure.

Besides, the district court had no jurisdiction to enter a judgment in favor of the government if it was immune from suit, and subject matter jurisdiction is not waivable. Even if a final judgment had been entered, there are now grounds for relief from that judgment by motion in the district court pursuant to the eleventh circuit's directions. The modification of the "law of the case" by the eleventh circuit did not go beyond the issues involved in the interlocutory appeal before the court.

II.

A. Because the Plaintiff's claim is not the type that would require judicial involvement in sensitive military affairs at the expense of military discipline, the court of appeals was correct in holding that Plaintiff's FTCA claim is not necessarily barred by the *Feres* doctrine. Recent developments in the decisional law from this court and from several circuit courts of appeals demonstrate that the *Feres* doctrine should bar an FTCA action only when

its primary rationale is implicated. A mechanical application of the *Feres* doctrine in a case where the facts fall outside the rationale of *Feres*, would reduce American servicemen to a worse position than incarcerated federal prisoners who are allowed to sue the government under the FTCA and the responsible individuals under a *Bivens* action for violation of constitutional rights.

Although the civil courts are justified in generally deferring to intra-military procedures to resolve most cases of isolated misconduct by military servicemen, civilian courts are a more institutionally competent forum for certain claims in which widespread and egregious misconduct is alleged which would cause embarrassment to the military, and in which important societal norms are to be vindicated.

In this case the Plaintiff was not on his regular active duty status while at Edgewood Arsenal during the testing program. He had been released from his duty status at Fort Knox and he was free to stay at Edgewood Arsenal for the testing or to leave at any time he wanted and return to his duties at Fort Knox. There is no evidence of any disciplinary relationship between Plaintiff and anyone else at the testing facility. There is also no evidence in the record of how the LSD testing supposedly related to Plaintiff's military service. There *is* evidence suggesting that the drug experimentation program was sponsored or controlled by other non-military federal agencies and was intended to test methods of mind control and behavior modification. This is far attenuated from Plaintiff's military service.

This case does not involve any questioning of military orders and does not implicate military discipline. Plaintiff was not a "volunteer" for drug testing. This case does

not require a court to second-guess the wisdom of military decisions. The Army itself has already admitted its own error in the Inspector General's report. The facts of this case demonstrate a patent violation of the Nuremberg Code prohibiting involuntary human experimentation of this nature. The circumstances of this case do not involve the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review.

Since the defendants are not members of the armed forces nor civilian employees engaged in activities usually associated with the armed forces (the typical *Feres* factual paradigm), the lower courts were correct in considering that the rationale of the *Feres* doctrine is not implicated by the facts of this case.

B.

The court of appeals did not err by holding that Plaintiff's *Bivens* claim is not barred by *Chappell,* and by noting how the "special factors" present in *Chappell* are not present in this case.

The *Chappell* case involved superior military officers on board plaintiff's navy combat vessel who were being sued for making certain command decisions which were alleged to be racially motivated. There is a world of difference between those allegations and the facts in the present case. This Court's holding in *Chappell* was expressly *not* intended to prohibit *all* civil claims by military servicemen for constitutional wrongs they suffer in the course of military service.

The circuit courts are in conflict on the proper interpretation of *Chappell* but the majority have ruled, consistent with the eleventh circuit below, that it was not

meant to be as pervasive as the government argues. The third circuit is in conflict but the eighth circuit and ninth circuit are in accord with the eleventh circuit in this case.

The rule advocated by petitioners in a case of this nature would do more to promote corruption in the military than to promote discipline.

Veterans benefits would not compensate plaintiff for the type of injury he has suffered. Veterans benefits do not purport to compensate for depriving citizens of their most fundamental constitutional rights and for destroying a man's life and inflicting mental anguish. VA benefits do not serve the important deterrent purpose behind a *Bivens* action to discourage such abuse of power by civilian officers and agents of the federal government. The nature of the acts involved in this case deserve to be affirmatively deterred.

Also, the Petitioners' concealment of the true facts for eighteen years (and for seven years after Plaintiff's retirement from the Army) has substantially prejudiced Plaintiff's ability to show a "service connection" of his disability to the 1958 LSD experiments, to satisfy VA regulations. The Army Claims Service denied Plaintiff's claim, in part, because it rejected the alleged connection with military service.

The intra-service remedies in *Chappell* were found to be adequate by this Court and other special factors existed in *Chappell* which do not exist here. Unlike the plaintiffs in *Chappell,* Mr. Stanley is not just claiming the Army cheated him out of money or a promotion. The intra-service remedy, if not equally as effective as a *Bivens* action, must at least "provide meaningful remedies" before it rises to the level of becoming an important "special

factor." There is no basis for reading into the Veterans Benefits Act an exclusive remedy provision which Congress left out.

The individual defendants are entitled, of course, to raise a qualified immunity defense if they acted in good faith and reasonably believed their conduct to be lawful.

The eleventh circuit below employed the same functional approach to immunity law which this court sanctioned in an opinion written the same day as the *Chappell* opinion.

ARGUMENT

I. The Court of Appeals Did Not Lack Jurisdiction Over the Plaintiff's FTCA Claim.

As mentioned earlier, no final judgment was entered by the clerk on the civil docket pursuant to the court's Rule 54 (b) order directing the clerk to enter it, nor was any notice of entry of judgment mailed by the clerk to the parties pursuant to Rule 77 (d).

Under F.R.C.P. 54 (b), the district court may "direct the entry of a final judgment" as to fewer than all of the parties by making "an express direction for the entry of judgment" to the clerk. Here, the district court "ordered that the clerk enter final judgment in favor of the United States." (Pet. App. 54a-55a). However, that "order" is not self executing and is not appealable. (From its own language, the order was obviously not intended to be self executing.)

F.R.A.P. 4 (a)(6) provides that a judgment is "entered," for appeal purposes, when it is entered in com-

pliance with Rules 58 and 79 (a) of the F.R.C.P. Rules 58 and 79 (a) require the clerk to "enter" the judgment, as a separate document, on the civil docket, and provide that it shall only be effective when that has been accomplished. See also Form 32, appended to the F.R.C.P. The federal courts have repeatedly noted that until the clerk enters a separate judgment on the civil docket pursuant to Rules 58 and 79 (a), the appeal time does not begin to run. *United States v. Indrelunas*, 411 U.S. 216 (1973); *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978); *Ferrell v. Beatrice Pocahontas Co.*, 585 F.2d 683 (4th Cir. 1978); *Rappaport v. United States*, 557 F.2d 605 (7th Cir. 1977).

Petitioners state that the clerk entered the court's *order* on the docket pursuant to Rule 79 (a), however Rule 58 and the case law specifically require that "every judgment shall be set forth on a separate document" (the form of which must be approved by the court) and "a judgment is effective only when so set forth and when entered as provided in Rule 79 (a)." Petitioners refer to this as being "hyper-technical" (Pet. brief at 13) but the rules clearly provide for it for the reasons explained in the advisory committee notes on the 1963 amendment to Rule 58. The requirement that there be a judgment set out and entered as a separate document from the court's memorandum order directing the Clerk to enter it was intended to eliminate uncertainty as to the time for appeal.[9]

Even if the clerk had followed through and entered a separate final judgment on the civil docket, it still would not foreclose a later inquiry in the partial final judgment

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9. The eleventh circuit below incorrectly referred to a "final judgment" having been entered on the FTCA claim rather than an "authorization for final judgment" which would have been more accurate. (Pet. App. 5a). However, the eleventh circuit correctly treated it as an "order."

for several reasons. First, the district court had no subject matter jurisdiction to enter a partial final judgment for the United States on grounds of sovereign immunity. At most, all it could do was dismiss the action without prejudice for the reasons explained in *Stanley v. Central Intelligence Agency,* 639 F.2d 1146 (5th Cir. 1981). As the fifth circuit stated in the first appeal in this case, *Stanley, supra;* the only correct disposition of a case based on *Feres* is a dismissal for lack of jurisdiction since the government is immune from the court's jurisdiction. (Pet. App. 86a-95a). Thus, the district court had no jurisdiction to enter a partial final judgment based on *Feres,* and a lack of subject matter jurisdiction can be raised at any time in the litigation. It cannot be waived by any party's action or inaction. F.R.C.P. 12 (h); *Kain v. Winslow Mfg., Inc.,* 736 F.2d 606 (10th Cir. 1984); *Eagerton v. Valuations, Inc.,* 698 F.2d 1115 (11th Cir. 1983).

Second, even if there had been a final judgment entered which was not appealed, Plaintiff would now certainly have a viable motion for relief from that judgment under Rule 60 (b), for reasons number (4), (5) and (6) listed under that rule. The eleventh circuit's opinion in this case could be construed to simply provide support for a Rule 60 motion for relief from judgment when the case returns to the district court on remand.

Petitioners also argue that the eleventh circuit lacked jurisdiction to reopen the FTCA claim when it went beyond the issues involved in the interlocutory appeal before the court, dealing with the *Bivens* claim. However, the issues involved in the *Bivens* claim and the alleged immunity of the individual defendants closely parallels the government's immunity due to the *Feres* doctrine when the government is sued under the FTCA. In the inter-

locutory appeal the individual defendants argued entirely on the basis of the *Feres* doctrine and how its rationale should also be applied to *Bivens* actions to make them all immune from this lawsuit. It was not improper for the eleventh circuit to reconsider the application of the *Feres* doctrine to this case, since that is what all parties were arguing about in the interlocutory appeal. While it impacted on an earlier order, it also impacted directly on the order involved in the interlocutory appeal.

The assertion that the United States' interests were not represented by anyone in the eleventh circuit should ring hollow. The United States has been, and still is, represented by the Department of Justice which filed briefs with the eleventh circuit. The Department of Justice also represents the individual federal defendants. Even after the United States was dismissed by the district court's interlocutory order, the United States was still filing (by and through the Department of Justice) its "suggestion of interest" in the continuing litigation pursuant to 28 USC §517 and 28 C.F.R. §50.15. (R. 1281-1283). The Department of Justice has ably represented the interests of all the federal defendants, including the government, throughout this litigation.

Apart from these procedural issues, petitioners do not seem to challenge the eleventh circuit's discussion of how an appellate court that has once created the "law of the case" can reopen the issue in a later appeal when controlling authority has changed in the interim or manifest injustice would otherwise result. See also *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984); *Yamamoto v. Omiya*, 564 F.2d 1319 (9th Cir. 1977); *Lehrman v. Gulf Oil Co.*, 500 F.2d 659 (5th Cir. 1974).

II. Because the Plaintiff's Claim Is Not the Type That Would Require Judicial Involvement in Sensitive Military Affairs at the Expense of Military Discipline:

A. The Court of Appeals Did Not Err by Holding That Plaintiff's FTCA Claim Is Not Necessarily Barred by the Feres Doctrine.

Recent developments in the decisional law demonstrate that the *Feres* doctrine should bar an FTCA action only when its primary rationale is implicated. In 1981 when this case went up on appeal for the first time, the fifth circuit focused on the plaintiff's having "volunteered" for the program and cited a string of "volunteer" cases (Pet. App. 72a-73a); but overlooked the fact that plaintiff was not a true volunteer because his consent had been fraudulently extracted. The fifth circuit also expressed reliance on the fact that the drug experiments occurred on a military base. (Pet. App. 75a). Since that time, this Court has discounted the importance of that one fact.

In *United States v. Shearer*, 473 U.S. ....., 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985) this Court noted that *Feres* seems best explained by the military discipline rationale, and that other rationales sometimes advanced in the past to support the *Feres* doctrine are "no longer controlling." *Shearer*, 105 S.Ct. 3043, n. 4. This Court stated, "the situs of the [incident] is not nearly as important as whether the suit requires the civilian court to second-guess military decisions." *Id.* at 105 S.Ct. 3043.

An activity should be deemed "incident to military service" only when the policy factors that support the *Feres* doctrine are applicable to the facts. As this Court stated in *Shearer*, "[t]he *Feres* doctrine cannot be reduced

to a few bright-line rules; each case must be examined. . ." That language suggests it is the underlying reason for the *Feres* doctrine which must control its application to any given set of facts. A judicially created exception to a remedial act of Congress should have a substantial reason to support it, and should only be applied when that substantial reason is implicated. The *Feres* bar should be erected only in those cases which would involve the judiciary in sensitive military affairs at the expense of military discipline.

A mechanical application of the *Feres* doctrine, in a case where the facts fall outside the rationale of *Feres*, would reduce American servicemen to an even worse position than federal prisoners who are permitted to sue the government under the FTCA for negligence of prison officials. *United States v. Muniz*, 374 U.S. 150 (1963).

It took about three decades for this Court and the lower federal courts to finally begin to place realistic limitations on the *Feres* doctrine. Until then, the doctrine was grudgingly followed by the federal courts but it was so widely criticized over the years that it was commonly referred to as the "much-maligned *Feres* doctrine." This Court is undoubtedly aware there is presently a strong contingent in Congress with plans to modify the doctrine (at least in the area of medical malpractice).

As a result of the shift in methodology that has occurred, the courts within the past several years (both before and after this Court's opinion in *Shearer, supra*) have taken a fresh approach to these cases and have declined to apply the *Feres* doctrine as a bar except when the litigation would likely involve the judiciary in sensitive military affairs at the expense of military discipline. In

addition to the decision of the eleventh circuit in the present case, see also *Atkinson v. United States*, 804 F.2d 561 (9th Cir. 1986); *Roush v. United States*, 752 F.2d 1460 (9th Cir. 1985); *Brown v. United States*, 715 F.2d 463 (9th Cir. 1983); *Johnson v. United States*, 749 F.2d 1530 (11th Cir. 1985), reinstated en banc 779 F.2d 1492 (1986), cert. granted (October 6, 1986, Case No. 85-2039); *Cole v. United States*, 755 F.2d 873 (11th Cir. 1985); *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984), cert. denied, 105 S.Ct. 3524 (1985); *Hunt v. United States*, 636 F.2d 580 (D.C. Cir. 1980); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980); *Cooper v. Perkiomen Airways, Ltd.*, 609 F.Supp. 969 (E.D. Pa. 1985).

Implicit in the only rationale for the *Feres* doctrine that has survived the scrutiny of time (the avoidance of having the civil courts intervene into sensitive military issues and second-guess military orders) is the belief that military courts and intra-military procedures can perform the public tort law functions of compensation and deterrence, while protecting the military's interest in maintaining discipline, better than the civil courts can. Petitioners essentially argue this when they maintain that the civil courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." (Pet. brief at 21). Even if one believes this is true in the abstract, there are surely exceptions to that rule, of which this case is illustrative.

Public tort law is a system of rights and remedies for citizens who have been harmed by the activity of government officials. Congress' enactment of the FTCA was an acknowledgment of its confidence in the public tort system. A civilian court's deference to intra-military procedures on the ground that the military knows more

about the requirements of discipline reflects a view which we do not criticize in the abstract. However, civilian courts are a more legitimate and institutionally competent forum for certain claims in which important societal norms are to be vindicated.

The military justice system is certainly competent to punish and deter isolated misconduct of lower level officers that departs from the military's own norms of behavior. No one doubts the military's zeal to deter conduct deviating from its own norms. However, it has been noted by legal scholars that the intra-military remedial system cannot be relied on to play a watchdog role when it may cause embarrassment to the military. It is naive to overlook the temptation for the military to cover up its own embarrassing wrongdoing on a grand scale. See *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 Yale L.J. 992, 999 (1986). It has not been unknown for high-ranking officers to exert influence over intra-military investigations into their own misconduct to limit the potential for embarrassment. See *For Admiral, Warning; For G.I.'s, Jail*, N.Y. Times, Feb. 16, 1985, §1, at 5, Col. 3.[10]

Recent events have again underscored the occasional misuse of military channels by federal civilian agencies. There is a strong public interest in having a military establishment that is not entirely monolithic and autocratic. Due to internal, institutional pressures to conform or exhibit loyalty in the military, cases involving particularly

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10. Cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.")

egregious or widespread military misconduct are more appropriately resolved by the civilian courts.[11]

The judges that have reviewed this case have found the misconduct involved to be unique and particularly egregious. The district judge (a nine year veteran on the federal court and a state trial judge for fourteen years before that) stated: "This court has seen few cases which more desperately cry out for and demand judicial redress." (Pet. App. 51a). This case presents shades of an Orwellian novel where even one's own creative thought process is altered and controlled by the government. The district judge noted: "The acts alleged to have been committed by the officers and agents named as defendants in this case are insidious to the most fundamental rights protected by our Constitution: the right of an individual to control his mind, his private thoughts, and his bodily integrity." (Pet. App. 51a). "The conduct alleged in this case would shock—if not outrage—the conscience of any court, and is most certainly protected against by the Constitution of the United States." (Pet. App. 65a). Obviously, this is not a garden variety *Feres* or *Chappell* type case, and it is not likely to be a recurring fact pattern.

For that reason, the petitioners exaggerate when they argue in their brief (at p. 21) that if this case is allowed to go forward there will be no basis to stop other soldiers from going to court to challenge the way they have been treated by military superiors. We certainly do not advo-

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11. At page 2, n. 1 in their brief, the petitioners admit that plaintiff was only one of about 1,000 unwitting soldiers who were covertly drugged with LSD between 1955 and 1958. The statute of limitations will have run on those who, along with the plaintiff, were notified in 1975 but did not timely file suit. However, to deny this plaintiff (who did timely file suit) redress in the civil courts for this type of egregious and widespread misconduct would be to abdicate the civil courts' traditional role to vindicate the violation of important societal norms.

cate an open door policy for every soldier who challenges his or her treatment by military superiors to litigate such grievences in the civil courts. However, the facts of this case are unique and are not inherently military in nature. They are not unlike the claim a civilian would have against a CIA agent who covertly introduced LSD into his bloodstream in a tavern one night by use of an aerosol spray.[12]

The facts of this case are distinguishable from the other *Feres* or *Chappell* type of cases that have been before this Court. The plaintiff here was not on his regular active duty status while at Edgewood Arsenal during the testing program. The eleventh circuit noted this in its opinion. (Pet. App. 12a). Plaintiff was released from his duty status at Fort Knox, and while at Edgewood Arsenal, he had complete control over his movements (when he was not drugged). At any time, he could withdraw from the program and return to Fort Knox. There is no evidence as to any disciplinary relationship between plaintiff and anyone else at the testing laboratories. There is no evidence as to his technical duty status during that month. There is also no evidence in the record of how the LSD testing supposedly related to plaintiff's military service. There are documents in the record suggesting the possibility that these drug experimentation programs were sponsored or controlled by other non-military federal executive agencies and were intended for mind control or behavior modification purposes.[13]

This case is unlike the cases relied on by the Petitioners. There is no questioning of direct military orders

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12. Human Drug Testing by the CIA, 1977, *supra* at 100.

13. The mission of the army is to preserve peace and security, provide for the defense, support and implement national policies and objectives, and to overcome other aggressive nations. 10 USC §3062.

involved here (unlike the atomic testing cases), no threatened effect on performance of military duty or discipline, no facts involving the special nature of military life, the Plaintiff was not availing himself of one of the benefits of military service when the incident occurred (unlike the cases involving medical negligence by military doctors during the course of rendering free medical care to servicemen), nor is this case similar to the typical "volunteer" cases since Plaintiff never gave an informed consent to any drug experimentation.

Nor does this case require a civilian court to second-guess the wisdom of military decisions.[14] The petitioners argue (at p. 9 in their brief) that a central issue in plaintiff's case would be whether the army erred by covertly administering LSD to soldiers in the 1950's (and also by failing to debrief them when they returned to active duty, and even failing to debrief them when they were discharged to civilian life years later). There is no question the army erred and that point is so clear that it does not at all involve the judiciary in sensitive military matters. The army itself has already made the conclusion in the Inspector General's report that the drug experiments were unauthorized by existing army regulations. (See R. 145 and I.G. report at 41, 45-46, 49-50, 116).

The allegations here (which the government admits) raise a case of patent illegality and violation of the Nurem-

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14. This is so even assuming there were military decisions involved in this case. Whether there was any military decision-making or whether the testing program was controlled instead by another civilian governmental agency is not apparent from the record. As shown by the documents filed by the plaintiff which discuss many similar drug testing programs during this ignominious period in our nation's history, this would not be the first time the CIA or other civilian government agency used the military as a conduit to channel funds for a non-military purpose.

berg Code, not just a question of the wisdom of military decision-making. Involuntary human experimentation of this nature has been condemned and declared illegal by every pertinent statute and regulation of the United States and by international standards. See *United States v. Karl Brant, et al.*, 2 Trials of War Criminals Before Nuremberg Military Tribunals, 181, 182 (1949). The Nuremberg Code has been adopted by the AMA and by the Chief of Staff and the Secretary of the Army, Navy and Air Force. (See R. 74, 144). Under the Nuremberg Code the actions alleged (and admitted by the government) to have occurred here give rise to criminal liability despite the defenses of "military necessity" or "obedience to superior orders." See *United States v. Karl Brant, supra* at 1-12, 174-184.

Besides, just because a case may involve the issue of whether the army erred does not mean it necessarily involves an issue too sensitive for the civil courts to consider. Otherwise, the only forum that could ever decide if the army erred would be the army. As mentioned earlier, while the military justice system is highly competent to punish and deter isolated misconduct deviating from its own norms of behavior, the civil courts are more institutionally competent to resolve cases involving particularly egregious or widespread military misconduct. In such cases the civil courts will command greater public confidence.

Also, just because one officer may have to testify against another should not be the litmus test in determining whether a particular case "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Shearer, supra* at 105 S.Ct. 3044. Such a test would eliminate every conceivable claim in which the military is even peripherally involved.

The interest in not having one officer testify as to another officer's actions has not been deemed strong enough to foreclose haling military officers into court when the plaintiff is someone other than an intra-military tort victim. For example, General William Westmoreland's recent multimillion dollar defamation suit against CBS brought high-ranking military officials into court to testify on both sides as to decisions and actions that were highly sensitive. See e.g. *Jury Told of Order to Cut Troop Count,* N.Y. Times, Feb. 12, 1985 at B6, Col. 4. Indeed, General Westmoreland claimed to have settled the case because he was disheartened that a colleague, Major General Joseph McChristian, had testified against him. *The Westmoreland Case: A Broken West Point Tie,* N.Y. Times, Feb. 24, 1985, §1, at 1, Col. 3. See also *Scheuer v. Rhodes,* 416 U.S. 232 (1974) (adjutant general of Ohio and subordinate officers not immune from damage suits arising out of Kent State shooting).

Civilian plaintiffs are not barred from suing for injuries caused by the tortious conduct of the military.[15] In cases involving civilian plaintiffs, the extent of factual inquiries into military affairs is not substantially less than in cases involving military plaintiffs. The fact that a military official may have to testify is not, by itself, an overpowering justification for barring all claims by military plaintiffs in all cases. That should not be the basis to determine whether the particular case would involve the judiciary in sensitive military affairs at the expense of military discipline.

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15. The language of the FTCA makes explicit that Congress contemplated suits against the military, but created exceptions to liability for claims "arising out of the combatant activities of the military . . . during time of war." 28 USC §2680 (j) (1982).

Even if the plaintiff's activity at the testing laboratories is deemed incident to his military service, the reasoning of the eleventh circuit in *Johnson v. United States*, 749 F.2d 1530 (11th Cir. 1985), approved en banc 779 F.2d 1492 (1986), is sound and should be approved. If (as in the present case) the alleged tortfeasor is not a member of the armed forces nor a civilian employee engaged in activities usually associated with the armed forces (the typical *Feres* factual paradigm), *then* the court should consider the rationale supporting the *Feres* doctrine to determine to what extent, if any, the allowance of the suit would circumvent the purpose of the doctrine. (LSD experimentation is not an activity usually associated with the armed forces.)[16]

Petitioners argue (Pet. Br. at 18) that even if this Court agrees with *Johnson, supra,* the eleventh circuit has "far extended *Johnson* in this case." To the contrary, although it is our view that *Johnson* was correctly decided, this case is even more compelling than *Johnson* and would make for a narrower holding. This is so for several reasons.

First, this case raises questions about plaintiff's duty status, unlike *Johnson.* The injury here did not occur during the course of a military rescue operation as in *Johnson,* but rather, under circumstances far more attenuated from military service. It is notable that the district judge who dismissed the *Johnson* case was the same judge who refused to dismiss this case.

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16. Petitioners state in their brief (p. 18) that this case falls within the typical *Feres* factual paradigm "since Stanley alleges that his injuries were caused by Army officers and other employees (or contractors) of the Army." That is not accurate. The plaintiff's complaint does not make those allegations. (See J.A. 3-10, especially ¶s 14, 16, and 20).

Second, *Johnson* will govern all incidents of military air accidents in which FAA or other non-military personnel may arguably be negligent. That is obviously a fact pattern capable of recurring. We do not believe the facts of *this* case will ever again occur in this country (unless such conduct is not deterred).

Third, the plaintiff in *Johnson* received a full range of veterans benefits before bringing the FTCA action, however in this case administrative benefits are not available to compensate the plaintiff for the injury done to him. (Discussed further, *infra*).

This Court has not prevously considered (until the *Johnson* case which is now pending before this Court) whether *Feres* bars a serviceman's action for injury caused by the negligence of an employee of a civilian agency of the government. The rationale of *Johnson* and similar recent decisions from other circuit courts should be reaffirmed, as it was implicitly in *Shearer, supra*. In those cases where the prosecution of the claim would not compromise the military disciplinary structure nor otherwise encroach upon the rationale of the *Feres* doctrine, there is no sound reason for barring the action.

B. The Court of Appeals Did Not Err by Holding That Plaintiff's Bivens Claim Is Not Barred by Chappell.

If this Court finds that the *Feres* doctrine does not bar plaintiff's FTCA action against the United States, then this point would not require extensive discussion since it would logically follow that there would not be such an array of special factors as to preclude the *Bivens* claim against the individual defendants. However, even if the *Feres* doctrine does apply here to preclude the FTCA claim against the

United States, the eleventh circuit was correct in finding that it would not necessarily preclude the *Bivens* action against the responsible individual federal defendants, who are not superior military officers. The eleventh circuit carefully distinguished this case from *Chappell v. Wallace,* 462 U.S. 296, 103 S.Ct. 2362 (1983), by noting how the "special factors" present in *Chappell* are not present in this case.

In *Chappell, supra,* the defendants were all clearly "superior officers" (unlike the present case) consisting of the commanding officer and other officers on a navy combat vessel, who were being sued by enlisted navy men aboard the vessel. The Plaintiffs in *Chappell* claimed that because of their minority race the officers on board failed to assign them to desirable duties and gave them low performance evaluations, thus impeding their advancement in the navy. There is a world of difference between those allegations, which clearly involve command decisions affecting the Plaintiffs, and the allegations in the present case. This Court's holding in *Chappell* was premised on the need for knee-jerk reflex obedience to orders from superior military officers, and the disruption *in that type of case* that might result "if the soldier were allowed to hale his superiors into court."

The Petitioners rely on this Court's seemingly broad statement in *Chappell;* "We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." (103 S.Ct. at 2368). However, in context, this Court did not say it was creating a "per se" prohibition on all *Bivens* actions whenever the *Feres* doctrine would preclude an FTCA suit against the government. In fact, this Court noted it was dealing with a nonstatutory, constitutional

remedy rather than Congress' intent behind the FTCA, and this Court stated: ". . . The Court's analysis in *Feres* 'guides' [not 'controls'] our analysis in this case." *Id.* at 2365. This Court specifically cautioned that its decision should not be read to mean that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. *Id.* at 2367.[17]

Even if the *Feres* doctrine does preclude an FTCA claim in the present case, the rationale behind the *Bivens* case should not be overlooked. A *Bivens* action is a judicially-created, federal common-law remedy, implied directly from the constitution, and designed to fill a statutory gap where Congress has failed to create adequate statutory remedies for violations of constitutional rights. This Court in the *Bivens* case actually appears to have gone against the implied will of Congress since the remedy it created (damages for intentional torts committed by law enforcement officials) was at that time explicitly precluded under the FTCA. 28 USC §2680 (h) (1970) (amended by Pub.L.No. 95-253, 88 Stat. 50 (1974)). Indeed, the history of public tort law in America has been a story of "extraordinary judicial creativity and chronic legislative neglect." P. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 53 (1983).

Petitioners suggest that all the other federal courts to address the subject disagree with the eleventh circuit's

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17. Petitioners argue that the cases cited by this Court for this proposition in *Chappell* were not civil damage lawsuits, but habeas corpus or injunction cases, and therefore civil lawsuits for damages are still prohibited per se. Petitioners fail to explain how habeas corpus or injunction cases are any less disruptive or intrusive, or why they may not also involve second-guessing military decision-making. This is not a logical distinction. The nature of the relief sought is not nearly as important as the potential impact of the case on the military disciplinary structure, and that depends on the facts of the case.

interpretation of *Chappell* in this case, and they all find instead that *Chappell* imposes a per se prohibition against *Bivens* actions brought by servicemen regardless of whether the facts involved will impact on military discipline. In truth, the circuit courts are in conflict on the interpretation of *Chappell*, but the majority agree with the eleventh circuit.

The third circuit does appear to disagree with the eleventh circuit below, and to take instead a "per se prohibition" interpretation of *Chappell*. *Jorden v. National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986). (It should be noted, however, that *Jorden* was a 2-1 decision and it involved facts almost identical to *Chappell* which could not be distinguished even if there had been a factual inquiry.) The third circuit is the only circuit we have found to be in conflict with the eleventh circuit on this point.[18]

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18. Petitioners also cite *Trerice v. Summons*, 755 F.2d 1081 (4th Cir. 1985) and *Martelon v. Temple*, 747 F.2d 1348 (10th Cir. 1984) as examples of cases that reject the eleventh circuit's interpretation of *Chappell* and hold *Chappell* to require a per se prohibition despite the nature of the conduct and whether the suit would impact on military discipline. Neither of those cases say any such thing. The plaintiffs in those cases were simply precluded because their claims were essentially identical to the claims in the *Chappell* case. Those cases did not discuss the issue involved in this case.

Petitioners also rely on *Mollnow v. Carlton*, 716 F.2d 627 (9th Cir. 1983), however the ninth circuit has since then taken a different view of *Chappell* and *Feres* and is now in the same camp as the eleventh circuit in this case. See *Gonzalez v. Dep't of the Army*, 718 F.2d 926, 929 (9th Cir. 1983); *Atkinson v. United States*, 804 F.2d 561 (9th Cir. 1986).

Petitioners also cite *Gaspard v. United States*, 713 F.2d 1097 (5th Cir. 1983) however that case is much different and was even distinguished by the district judge in this case. (Pet. App. 32a-33a). The plaintiff here was not acting pursuant to direct orders, unlike the nuclear testing cases such as *Gaspard*. As the eleventh circuit below noted, "Because he was surreptitiously administered the drug, Stanley could not possibly have challenged

(Continued on following page)

While the third circuit disagrees with the eleventh circuit in this case, the eighth circuit and the ninth circuit now take the same flexible approach used in this case and expressly reject the "per se prohibition" interpretation of both *Chappell* and *Feres*. See *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984), cert. denied 105 S.Ct. 3524; *Atkinson v. United States*, 804 F.2d 561 (9th Cir. 1986). See also *Shaw v. Gwatney*, 584 F.Supp. 1357, 1362 (E.D. Ark. 1984).

In *Brown, supra*, the eighth circuit applied this court's language in *Chappell* and went on to analyze whether the rationale of the *Feres* doctrine would be fulfilled by applying it to the facts before the court. The court concluded that the case presented such a "unique factual situation" that the plaintiff should be able to sue the defendants individually even though an FTCA claim could not be prosecuted under the *Feres* doctrine.[19]

The present case involves facts even more unique than *Brown, supra*. This case does not involve or threaten to compromise military discipline, nor the "special nature of military life." A case like this could easily involve a civilian as much as a military serviceman (and in fact

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Footnote continued—

his 'orders' to drink the clear substance. 'The inescapable demands of military discipline and obedience to orders' are not implicated by the facts of this case." (Pet. App. 12a). The court in *Gaspard* expressly stated that "it is crystal clear that *Bivens* claims are distinct from FTCA actions, and the *Feres* bar therefore does not automatically preclude the *Bivens* claim." 713 F.2d at 1102. See also *Gaspard, supra* at 1105, n. 17.

19. *Brown* was actually a civil rights action but even petitioners maintain in their brief (at footnote 17) that *Bivens* actions against federal officers should be treated the same as civil rights actions against state officers in applying the *Chappell* immunity. We agree with that. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818, n. 30 (1982).

such covert drug testing did include civilians, according to the testimony at Senate hearings).

A trial in this case would not involve second-guessing of any military orders directed to this Plaintiff, since he was under no orders. The petitioners argue it could ultimately involve an inquiry into higher echelon military decision-making. (This assumes there were military decisions involved in this case. See footnote 14, *supra*.) However, if that was the standard for prohibiting a *Bivens* action in any case, no matter what kind of wrongful act may be perpetrated on a serviceman, the defendants could always remain immune by asserting their act was a result of "military decision-making."

The public interest in protecting decision-making processes varies with the type of decision or function involved. For example, a strategic or tactical decision during wartime may be entitled to the utmost protection from judicial intrusion,[20] whereas a decision to test the usefulness of LSD for interrogations deserves less protection. The circumstances of this case do not involve the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review.

Petitioners argue (at page 26, n. 18 in their brief) that "national survival in war may depend on unquestioning obedience to military orders." However, there is a specific FTCA exception for "combatant activities" during time of war, which should certainly be a paramount special factor counseling hesitation in a *Bivens* action. That concern is not implicated at all by the facts of this case.

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20. See, for example, FTCA exceptions to governmental liability for "discretionary functions" or "combatant activities." 28 USC §§2680 (a) and (j).

The public interest in maintaining in the armed forces soldiers who are blindly obedient to orders also has its limits. Compare the dictum in *Chappell v. Wallace*, 462 U.S. at 300 ("habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection") with *United States v. William Calley*, 22 C.M.A. 534, 541, 48 C.M.R. 19, 26 (1973) ("The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person.") Military law imposes an obligation on soldiers to refuse to obey unlawful orders, a duty quite inconsistent with unthinking obedience. Soldiers are subject to criminal sanctions for obeying orders to commit war crimes. *United States v. Calley, supra; United States v. Kinder*, 14 C.M.R. 742, 770-773 (1953).

The acceptance of the "per se immunity" rule argued for by petitioners under the type of facts in this case would be tantamount to admitting that because of Plaintiff's military status, federal officers can willfully and knowingly violate his constitutional rights without fear of accountability in the civil justice system. Would such a rule promote discipline in the military or encourage corruption? What would be the effect on morale and discipline if the judiciary countenanced (by ignoring) such patent illegality? To deny Plaintiff civil redress under these circumstances would do more to undermine military discipline than to permit recovery. The existence of a civil damages remedy for the type of conduct involved in this case would actually promote discipline since soldiers could be more confident that obeying orders would not result in undetected harm to them, such as ingestion of LSD.

This Court has held that even a convicted and incarcerated federal prisoner may bring a *Bivens* action against

prison officials for violation of constitutional rights, under compelling circumstances. *Carlson v. Green*, 446 U.S. 14 (1980). Likewise for an FTCA action alleging negligence of prison officials. *United States v. Muniz, supra.* If the disciplinary structure within our prisons is not so overwhelming under all circumstances to preclude a civil lawsuit, should it be so in the military? By arguing for a "per se" prohibition against allowing a *Bivens* action for this case, the government is actually saying that an army master sergeant like Mr. Stanley should be relegated to a position inferior to that of a convicted and incarcerated federal prisoner. What kind of rational policy can justify such an anomalous result?

Finally, the petitioners discuss, in general terms, the possibility of veterans benefits that may be available to plaintiff. The petitioners fail to specify what particular VA regulation covers this type of claim and compensates for the type of injury that has been suffered here. Plaintiff alleges he has been deprived of his constitutional right to privacy of his mind and body, his right of bodily integrity and the right to control his own behavior and intellectual thought processes, he has suffered mental anguish, the disruption and termination of his promising army career, permanent psychological injuries, and worst of all the disruption, breakdown and dissolution of his marriage and family life. (J.A. 7-8). There are no veterans benefits to compensate for such injuries, nor would veterans benefits serve the important deterrent purpose behind a *Bivens* action to discourage such shocking conduct and abuse of power by civilian officers and agents of the federal government. The nature of the acts involved in this case deserve to be affirmatively deterred.

The petitioner's intentional withholding of the true facts until eighteen years after the fact and for almost

seven years after plaintiff's retirement from the army has also substantially prejudiced his ability to satisfy the V.A. regulations requiring an applicant to show "service connection" by evidence that a chronic disease (including psychoses) became manifest during the period of active service or within one year after discharge from service, soon followed by a "definite diagnosis." 38 C.F.R. §§3.307, 3.309. The Army Claims Service found "no causal connection has been shown between the administration of LSD and the conditions alleged by the claimant in his claim." (R. 761). Mr. Stanley needs legal representation to assist him in demonstrating the necessary causal connection. The VA's authority to p y (and the restriction on attorneys to accept) no more than ten dollars for attorney's fees on a VA claim serves to discourage needed legal representation for many VA claimants. See 38 USC §3404-05 (1982); *Walters v. Nat'l Ass'n of Radiation Survivors*, ... U.S. ....., 105 S.Ct. 3180 (1985).

Bivens and its progeny suggest a role for the courts in vindicating constitutional violations to deter unconstitutional tortious conduct where Congress has not created adequate remedial alternatives. The petitioners argue that there does not have to be "adequate" administrative compensation available, so long as Congress has shown some "activity in the field," which by itself creates a "special factor" that militates against allowing a *Bivens* action. That is not what *Chappell* stands for, since the intra-service alternative remedy in *Chappell* was found to be adequate. Also, other "special factors" existed in *Chappell* which do not exist in this case.

The problem with the petitioner's interpretation of *Chappell* is that it sweeps too many qualitatively distinct tort claims under its bar, without regard for the actual

adequacy of intra-military remedies to resolve a particular claim. Unless this Court intended in *Chappell, supra*, to silently modify the rule in *Carlson v. Green*, 446 U.S. 14 (1980), there must be a showing that Congress has provided an alternative remedy which it *explicitly* declared to be a substitute for recovery under the Constitution, before this will automatically preclude a *Bivens* action. *Carlson, supra* at 446 U.S. 19-20. The alternative remedial scheme must be equally as effective as the damages action. *Id.* at 446 U.S. 18-19. Unless this Court intended in *Chappell* to silently modify its holding in *Bush v. Lucas*, 462 U.S. 367 (1983) (which was decided on the same day as *Chappel*), there must be an alternative remedy to a *Bivens* action which, although not equally as effective, at least "provides meaningful remedies" before it rises to the dignity of being a "special factor."[21] Mere "activity in the field" by Congress is just one factor that goes into the equation, but it is not by itself overriding.

This one factor (Congress' activity in the field) was not "ignored" by the eleventh circuit below, as petitioners argue (at pp. 31, n. 23, 6-7). The eleventh circuit expressly considered it but concluded "that this factor also does not militate against permitting Stanley's *Bivens* claim." (Pet. App. 12a). If the intra-service remedy provides essen-

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21. *Bush v. Lucas*, at 385-386. This Court noted that the plaintiff's constitutional claims were "fully cognizable" within the elaborate and comprehensive civil service remedies available to the plaintiff in *Bush*. As stated by Justices Marshall and Blackmun in their concurring opinion, ". . . a different case would be presented if Congress had not created a comprehensive scheme that was specifically designed to provide full compensation . . . and that affords a remedy that is substantially as effective as a damages action." *Id.* at 390. In that case, as in *Chappell*, this Court's decision was based on the implicit finding that the alternative remedial scheme was at least adequate and provided meaningful remedies (if not equally as effective as a *Bivens* action) before it would constitute a substantial "special factor" counseling hesitation in allowing a *Bivens* remedy.

tially no compensation for the type of harm done to a serviceman (as in this case), then it does not amount to a very weighty "special factor" militating against allowance of a *Bivens* claim.

No-fault recovery under the Veterans Benefits Act does not infer an absolute license to inflict harm on military servicemen. There are normative limits to the circumstances under which the government may inflict injuries on its military personnel. VA benefits should not be considered the exclusive remedy for this plaintiff. The Veterans Benefits Act expressly recognizes the potential of duplicate benefits recovered under the FTCA, and provides a method of off-setting cumulative recoveries. 38 USC §351; *Brooks v. United States*, 337 U.S. 49 (1949); *United States v. Brown*, 348 U.S. 110 (1954). There is no basis for reading into the Veterans Benefits Act an exclusive remedy provision which Congress left out.

The eleventh circuit did *not* hold that *Chappell* is limited only to cases involving the Code of Military Justice as an alternative compensation scheme. The argument of the petitioners to that effect (at page 31) is misdirected. The eleventh circuit simply noted that the "intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* [the Board for the Correction of Naval Records and the Uniform Code of Military Justice] are clearly inadequate to compensate Stanley for the violations complained of here." (Pet. App. 12a-13a).

The eleventh circuit was correct on this point. The administrative remedies which would have fully compensated the plaintiffs in *Chappell* for the type of wrong inflicted in that case (retroactive back pay and promotions, and correction of naval records) would be meaningless to

Mr. Stanley in the present case. Such remedies cannot correct the constitutional wrong done to Mr. Stanley since, unlike *Chappell,* he is not just claiming the army cheated him out of money, or a promotion, or put unfair performance evaluations in his records.

The individual defendants are entitled, of course, to raise a *qualified* immunity defense if they acted in good faith (although that has not yet been pleaded). *Butz v. Economou,* 438 U.S. 478 (1978). However, they have the burden of pleading this as an affirmative defense and proving that they reasonably believed their conduct to be lawful. *Gomez v. Toledo,* 446 U.S. 635 (1980).

Since plaintiff in this case is suing civilian federal executive department officials rather than superior military officers within the normal chain of command, this case is more akin to this Court's holding in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) than to *Chappell, supra.*

Harlow involved a *Bivens* action for damages brought by a former employee of the Department of the Air Force against certain federal executive department officials who allegedly conspired to fire him by eliminating his position with the air force in retaliation for his testimony during a congressional investigation. The defendants asserted that their action was taken "to promote economy and efficiency in the Armed Forces."[22] On that basis the civilian federal officials sought absolute immunity from liability for their alleged unconstitutional conduct. However, this Court held that under a "functional" approach to immunity law, the immunity of the government officials extends no further than its justification warrants and unless the conduct involved embraces a function so sensitive as to re-

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22. See companion case, *Nixon v. Fitzgerald,* 457 U.S. 731, 734 (1982); and *Harlow, supra* at 805.

quire a total shield from liability, then the federal officers are entitled only to a qualified or "good faith" immunity. This Court held that federal officials seeking absolute immunity from liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope. *Id.* at 808. The qualified immunity would be defeated if the federal official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff." *Id.* at 815.

This "functional approach to immunity law" was the same type of reasoning employed by the eleventh circuit below in this case. This case does not involve the "typical *Feres* factual paradigm" and therefore warrants a factual inquiry to determine whether the suit is of such a nature that it would undermine military discipline, or involve the courts in sensitive military affairs, or otherwise implicate the concerns which underlie the *Feres* doctrine. That analysis is not in conflict with *Chappell*. In fact, it is the same analysis which this Court made in *Chappell* under the facts of that case which, unlike this case, was a classical example of the typical *Feres* factual paradigm.

This case may be an appropriate vehicle for this Court to clarify the meaning of its decision in *Chappell*, which has caused some confusion and disagreement among the circuit courts of appeals.

CONCLUSION

This Court should decline the Petitioners' request to expand the *Feres* doctrine and the holding in *Chappell* to embrace the entirely different circumstances presented in this case. The judgment of the court of appeals in this case should be affirmed.

Respectfully submitted,

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February, 1987

United States Court of Appeals

Eleventh Circuit
50 Spring Street, S.W.
Atlanta, Georgia 30303-3147

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names Of Parties

January 23, 1987

Richard A. Kupfer
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Servico Centre East
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No. 84-5273
James B. Stanley -v- U.S.A., et al.
D.C. No. 78-8141-CIV-JAG

Dear Mr. Kupfer:

Enclosed please find copies of the pages from the Record on Appeal requested in your letter of January 12, 1987. Also, please be advised that I have searched our record room and this office does not have any envelopes of exhibits.

If we can be of further assistance, please advise.

Sincerely yours,

MIGUEL J. CORTEZ, CLERK
By: /s/ Joyce Tuggle
Deputy Clerk

Enclosures

A2

United States District Court

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January 12, 1987

Mr. Richard Kupfer
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Rel: 78-8141-CIV-JAG
STANLEY V CIA

Dear Mr. Kupfer:

I have searched in every possible location in the Ft. Lauderdale Clerk's office for the exhibits you had your secretary call about. I also called our West Palm Beach Office and had them look for them. When the record originally went up on appeal the exhibits in question were sent in an envelope as an attachment to Docket Entry # 36. At this time, they are not in the Clerk's Office. I can find no indication that they were ever returned but this could be the result of a docketing error.

If I can be of any further help please let me know.

/s/ Penny Butler
Penny Butler
Deputy Clerk

No. 86-393

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

JAMES B. STANLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
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Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-393

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

JAMES B. STANLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In our opening brief, we argued that the court of appeals lacked jurisdiction to reconsider the dismissal of respondent's FTCA claims.[1] We also argued that, in any event, respondent's FTCA and *Bivens* claims are barred, respectively, by *Feres* v. *United States*, 340 U.S. 135 (1950), and *Chappell* v. *Wallace*, 462 U.S. 296 (1983). The Court

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[1]Respondent contends (Br. 15-16) that the judgment order dismissing the FTCA claim (Pet. App. 54a-55a) was not entered in accordance with Fed. R. Civ. P. 58, so that he is not barred from appealing the dismissal of his FTCA claim. There is no merit to that argument. As we explained in our opening brief (at 11-13), the judgment order is a separate document that fully complied with the requirements of Rule 58. Moreover, as we explained in our reply memorandum in support of our petition for a writ of certiorari (at 1-2 & n.1), the requirements of Rule 58 are expressly "[s]ubject to the provisions of Rule 54(b)," so a partial final judgment that complies with the requirements of Rule 54(b) starts the time for filing a notice of appeal running whether or not the judgment complies with the requirements of Rule 58.

plainly held in *Feres*, as a matter of statutory interpretation, that the FTCA did not waive sovereign immunity for actions based on injuries incurred by a service member incident to military service. In *Chappell*, the Court, looking in part to the reasoning underlying *Feres*, concluded that it would be inappropriate to recognize a *Bivens* remedy for military personnel against their military superiors.

1. Notwithstanding his own prior statements to the contrary and the Fifth Circuit's 1981 conclusion to the contrary, respondent now argues that his participation in the Army's chemical warfare tests in 1958 was not incident to military service. In part he is arguing for a revision of the *Feres* standard that would really eliminate the incident to service test by assigning it a new meaning looking to the effect of litigation on military discipline. That argument is fully discussed in our opening brief (at 16-20). Also, however, he appears to be making a factual argument that the Army's LSD testing program was not, in fact, a military activity. That factual argument is without merit.

The Army administered LSD to a number of service members in the 1950s, in response to reports that the Soviet Union had purchased a large quantity of LSD, in order to test its effects on soldiers. S. Rep. 94-755, 94th Cong., 2d Sess. 411-412 (1976).[2] In concluding that the administration of LSD to respondent at the Army's Chemical Warfare

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[2]Respondent complains (Br. 6-7) that the Senate Report concerning the Army program is not in the record. We know of no rule requiring the entry of congressional reports, which are available at law libraries throughout the country, into the record before they may be cited. Moreover, the findings of a Senate Select Committee are within judicial notice. See 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2410, at 338-361 (1971). In this case, where the alternative to taking judicial notice of the Senate's findings is to have respondent independently inquire into the Army's LSD testing program through this lawsuit, judicial notice is plainly warranted, since oversight of the military is committed to the political branches. See, *e.g.*, *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 5-6.

Laboratories in Maryland in February of 1958 was incident to his military service, the Fifth Circuit in 1981 stated: "At the time Stanley was given LSD, he was a Master Sergeant in the Army who had volunteered to participate in an experimental program in lieu of his regular duties. The experiment was conducted on an Army base by and for the benefit of the Army. Thus, the relationship between Stanley and the allegedly negligent individuals stemmed from their official military relationship." Pet. App. 76a. The Fifth Circuit rejected respondent's argument that he was not acting incident to service because he had volunteered to take part in the program, and held that his FTCA claim must be dismissed, noting: "Stanley was receiving military pay and was promised a letter of commendation for his participation in the program. Clearly his participation in the program was activity incident to his military service." *Id.* at 77a.

In reviving respondent's FTCA claim *sua sponte*, the Eleventh Circuit did not disagree with the Fifth Circuit's conclusion that respondent was given LSD incident to military service. It instead concluded that "[t]oday, in the Eleventh Circuit, controlling precedent does not automatically or mechanically preclude Stanley's lawsuit under the FTCA or *Bivens* upon a finding that he suffered the complained of injury while performing duties incident to military activities" (Pet. App. 19a). It thus found—erroneously, we submit—that the occurrence of injuries incident to service is not a sufficient predicate for the denial of FTCA liability.

Furthermore, respondent's Second Amended Complaint (which does not include an FTCA claim) alleges that the defendants were acting "under color of a covert federal Army pro[gram]" (J.A. 7, ¶ 14).[3] Respondent now claims

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[3]Respondent's Second Amended Complaint (J.A. 3-10) contains counts alleging a *Bivens* action, an action under 42 U.S.C. 1983, and an action under 42 U.S.C. 1985. The complaint was filed four months

that that statement does not mean what it appears to mean—that he was injured incident to service—but only means that the defendants "were acting under the color of what was supposed to be an army program to test gas masks and protective clothing" (Br. 10). That is belied by the concluding statement in the same paragraph of the complaint, which alleges that he was deprived of his rights pursuant to "official policy" (J.A. 7, ¶ 14). Thus, it appears that even respondent essentially conceded that he was acting incident to military service when he was administered LSD, and presumably for that reason he abandoned his allegation that the government is subject to suit under the FTCA.

In addition, it is clear beyond dispute that the program in question was an official Army program. It was developed and conducted by the Army Intelligence Board and the directors of the Army's Chemical Warfare Laboratories (S. Rep. 94-755, *supra*, at 411) "by and for the benefit of the Army" (Pet. App. 76a). Respondent challenges the latter finding (Br. 28). In contending that the testing was not the sort of activity usually associated with the military, respondent ignores the existence of intelligence information indicating that the Soviet Union had purchased a large quantity of LSD, possibly for use as a weapon. S. Rep. 94-755, *supra*, at 411 n.100. The military frequently conducts weapons tests, including chemical weapons tests; its Chemical Warfare Laboratories were established for that purpose.

Contrary to respondent's suggestions (Br. 7-10, 25 n.14), the program was not operated by the Central Intelligence Agency (CIA), with the Army playing only a minor role. In

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before this Court held in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), that the concerns underlying the *Feres* doctrine are a special factor counseling against the recognition of the right of service members to pursue *Bivens* actions.

fact, the Senate Report criticized the Army for its failure to coordinate its activities with the CIA, which also carried out LSD testing in the 1950s (S. Rep. 94-755, *supra*, at 413-414). Moreover, the Senate Hearings relied upon by respondent show that the CIA was not involved in the program under which he was administered LSD. Respondent cites (Br. 8) a Defense Department memorandum, reprinted with the hearings, ostensibly to indicate that the Army and the CIA cooperated in conducting drug testing. The cited memorandum makes clear, however, that the three programs in which the Army and the CIA cooperated were conducted between 1969 and 1973, not in 1958. *Human Drug Testing by the CIA: Hearings on S. 1893 Before the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 157 (1977) [hereinafter *1977 Hearings*]. Respondent also notes (Br. 9) that the CIA and the Army conducted some joint drug research at the Army's Chemical Warfare Laboratories, which is where he was given LSD. It is clear from the portion of the hearings cited by respondent, however, that the CIA was involved in drug testing there only after 1971 (*1977 Hearings* 153).[4]

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[4]Even if the Army had carried out its LSD testing program in conjunction with the CIA, that would not affect the conclusion that respondent's claims are barred. As we explained in our brief in *United States* v. *Johnson*, No. 85-2039 (argued Feb. 24, 1987), the military frequently acts with and through civilian agencies. Service members are barred by *Feres* from bringing tort claims against the government if they suffered injury incident to military service, even if they allege that their injury was caused by the negligence of a civilian, because claims based on injuries incurred incident to military service are "the type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer*, slip op. 6-7). Under *Chappell*, service members should also be barred from pursuing *Bivens* actions in such circumstances, since the purposes underlying the *Feres* doctrine are a special factor counseling against the recognition of a *Bivens* action.

2. Respondent also argues (Br. 25) that because the Army's Inspector General issued a report criticizing aspects of the Army's LSD testing program, proceedings in this case would not conflict with the interests underlying the *Feres* doctrine. The Inspector General did in fact issue a report (which is not a public document and is not in the record) that was critical of the program in many respects, as was the Senate Report. It does not follow from the existence of such a report, however, that *Feres'* interpretation of the FTCA, and *Chappell's* application of *Feres'* reasoning in the context of *Bivens* actions, are rendered irrelevant. Such a conclusion would penalize the government for studying past errors in order to prevent their recurrence. The injuries alleged here remain injuries incurred incident to military service, as to which the FTCA created no remedy, and the adverse impact of allowing damage actions against military personnel seeking redress for such injuries remains substantial, as this Court recognized in *Chappell*.[5]

Contrary to respondent (Br. 22-26), the political branches of government, not the judiciary, are responsible for control of the military. The courts are not to "second-guess military decisions" (*United States* v. *Shearer*, No.

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[5]In connection with the application of *Chappell* in the present context, respondent complains that we failed to specify what particular regulation under the Veterans' Benefits Act compensates for the injuries he alleges he suffered (Br. 36). He contends that he has suffered "severe and permanent * * * mental and psychological injuries" (J.A. 8, ¶ 18); the regulations providing for benefits for "mental disorders" incurred incident to military service are found at 38 C.F.R. 4.125 *et seq.* Respondent also alleges that he should be compensated for the breakdown of his marriage (J.A. 8, ¶ 18), and contends that this case is distinguishable from *Chappell* because the alternative remedy provided by Congress is not a complete remedy (Br. 39). While the Veterans' Benefits Act probably does not authorize all of the relief that respondent might desire (although it does authorize recovery for "*social* and industrial adaptability" (see 38 C.F.R. 4.132; emphasis added)), that does not mean that the Act is not congressional activity in the field.

84-194 (June 27, 1985), slip op. 5), and a trial in this case would clearly require review of the Army's LSD drug testing program by the judiciary.[6] Because respondent was administered LSD incident to military service—indeed, pursuant to an official Army chemical warfare testing program—his claims are barred.

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the decision of the court of appeals should be reversed.

CHARLES FRIED
Solicitor General

APRIL 1987

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[6]The Senate Report criticized the consent form used by the Army (S. Rep. 94-755, *supra*, at 417) and also criticized the Army's failure to conduct long-term follow-up studies on the participants in the LSD testing program (*id.* at 418). While the Senate Report thus found fault with aspects of the Army's LSD testing program, it of course did not evaluate the program from a legal perspective to determine whether the program as conducted violated the rights of the participants. That issue would be the focus of a trial in this case, requiring further inquiry into the Army's LSD testing program.